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NEGLIGENCE REPORTS

CURRENT SERIES

[CITED AM. NEG. REP.]

ALL THE CURRENT NEGLIGENCE CASES DECIDED IN THE FEDERAL COURTS OF THE UNITED STATES, THE COURTS OF LAST RESORT OF ALL THE STATES AND TERRITORIES AND SELECTIONS FROM THE INTERMEDIATE COURTS

TOGETHER WITH

NOTES OF ENGLISH CASES AND ANNOTATIONS

EDITED BY
JOHN M. GARDNER
OF THE NEW YORK BAR

VOL. IX

NEW YORK
REMICK & SCHILLING
1901

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PREFACE.

Following the plan of the previous volumes of the series of AMERICAN NEGLIGENCE REPORTS, actions relating to Injuries to Persons and Property, decided in the State and Federal Courts during the year 1901, together with a few decisions rendered in 1900, being Negligence cases arising out of the relations of CARRIER AND PASSENGER, LANDLORD AND TENANT, MASTER AND SERVANT, MUNICIPAL CORPORATIONS, STEAM AND STREET RAILROAD COMPANIES, and all other branches of the LAW OF NEGLIGENCE, are reported in this volume, 9 AM. NEG. REP.

An additional feature to the usefulness of these REPORTS is the number of SPECIAL NOTES on the various topics of NEGLIGENCE LAW, contributed by MR. WALTER J. EAGLE. This feature is to be continued and extended in subsequent volumes, and will, it is hoped, be of service to the practitioner in the making of BRIEFS on the subjects treated. Among the SPECIAL NOTES in this volume are the following: Presumption of Negligence in Live-Stock Killing cases; Notice of Claim against Municipal Corporations; Liability for Injury to Volunteer; Doctrine of Comparative Negligence; Rule of Stop, Look, and Listen; Liability of Municipal Corporations for Excavations and Openings on Highways; Right to Recover Indemnity from Wrongdoers; Liability for Turntable Accidents, etc. The complete list of Special and other Notes in this volume will be found at the end of the TABLE OF CASES REPORTED.

Annotations and Notes of English cases are added to many of the cases, with numerous cross-references to various topics and cases reported herein.

For the convenience of practitioners consulting this series of AMERICAN NEGLIGENCE REPORTS, an INDEX-DIGEST of the NOTES contained in VOLS. 1-9, INCLUSIVE, has been compiled and the same bound in this volume, such index being printed on colored sheets and placed before the TABLE OF CASES REPORTED herein. This INDEX TO NOTES will be of value in the search for authorities on any topic of NEGLIGENCE LAW.

The cases reported herein comprise decisions in the highest Courts of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana (Supreme and Appellate Courts), Indian Territory, Iowa, Kansas (Supreme and Appellate Courts), Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey (Supreme and Errors and Appeals), New York (Court of Appeals and Appellate Division of Supreme Court), North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas (Supreme and Civil Appeals), Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the United States Supreme and Circuit Courts of Appeals.

Reference to the TABLE OF CASES CLASSIFIED according to Facts, which precedes the Index, will enable the practitioner to see at a glance the nature of the case reported herein, and thus act as a ready guide to a case in point.

The Editor cordially acknowledges the able services of MR. WALTER J. EAGLE in the preparation of the cases and notes thereto, and the compilation of the Tables of Cases (together with the INDEX TO NOTES preceding the Table of Cases Reported) in this volume of AMERICAN NEGLIGENCE REPORTS.

JOHN M. GARDNER.

NEW YORK, *June*, 1901.

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The Editor cordially acknowledges the able services MR. WALTER J. EAGLE in the preparation of the cases and not thereto, and the compilation of the Tables of Cases (together wi the INDEX TO NOTES preceding the Table of Cases Reported) this volume of AMERICAN NEGLIGENCE REPORTS.

JOHN M. GARDNER.

NEW YORK, *June*, 1901.

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IN

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OF

AMERICAN NEGLIGENCE REPORTS

INCLUDING

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TOGETHER WITH

NOTES OF ENGLISH CASES AND ANNOTATIONS

EDITED BY
JOHN M. GARDNER
OF THE NEW YORK BAR

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AMERICAN NEGLIGENCE REPORTS.

GREEN v. PACIFIC LUMBER COMPANY.

Supreme Court, California, November, 1900.

PASSENGER JUMPING FROM TRAIN TO AVOID COLLISION — NEGLIGENCE FOR JURY. — Where plaintiff, a passenger on defendant's train, in her efforts to escape the threatened danger of a collision with another train, jumped or stepped from the train, fell upon the track, and rolled down an embankment, suffering great personal injuries, it was essentially a question of fact for the jury as to whether or not plaintiff was justified in jumping from the train (1).

COLLISION — BURDEN OF PROOF — INSTRUCTION. — In an action to recover damages for injuries sustained by plaintiff in jumping from defendant's train to avoid a collision, an instruction that all that was necessary for plaintiff to prove was that she was a passenger on defendant's car, that said car came into collision with one of defendant's trains, and that plaintiff was injured thereby, and that such facts established a *prima facie* case against defendant, throwing the burden of proof upon defendant, was proper, as the same contained a sound principle of law applicable to common carriers, to which no objection could be made.

EVIDENCE — EXPERT. — It is not necessary for a witness, who acted as nurse for plaintiff after her injuries were received, to be an expert to state what she had heard from plaintiff as to the latter's complaints of pain and suffering.

PAIN AND SUFFERING — DECLARATIONS. — Involuntary declarations and exclamations of a person's present pain and suffering are admissible as tending in some degree to show his physical condition; but when such declarations only amount to statements of past condition they should be rejected.

1. *Collisions.* — For other actions relating to Passengers Injured in Collisions, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See also note on COLLISIONS ON STEAM

DEPARTMENT 1. Appeal from Superior Court, Humboldt County.

Action by Nancy Green against the Pacific Lumber Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. *Judgment affirmed.*

S. M. BUCK, for appellant.

J. H. G. WEAVER and W. F. CLYBORNE, for respondent.

GAROUTTE, J. — This is an action to recover damages for personal injuries. Defendant appeals from the judgment and order denying a motion for a new trial. Defendant was engaged in the lumber business, and in connection therewith operated a railroad. Plaintiff

RAILROADS BY WHICH PASSENGERS ARE INJURED, 8 AM. NEG. REP. 161–166.

See also note on PASSENGERS INJURED IN COLLISIONS ON STREET RAILROADS, 8 AM. NEG. REP. 322–327.

For INJURIES TO EMPLOYEES IN COLLISIONS, see notes in 8 AM. NEG. REP. 240–246; Id., 400–405; Id., 500–503.

For actions relating to Passengers Injured in Collisions, from the earliest period to 1897, see vols. 2–7, and vols. 9 and 10 Am. Neg. Cas.

Actions relating to PERSONS INJURED IN COLLISIONS AND AT RAILROAD CROSSINGS, from the earliest period to 1897, appear in vols. 11 and 12 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States.

Imminent danger. — See the following cases relating to persons jumping from trains, street cars, etc., to avoid danger: Shannon *v.* Boston & Albany R. R. Co., 78 Me. 52, 3 Am. Neg. Cas. 585; Jacquin *v.* Grand Ave. Cable Co., 57 Mo. App. 320, 4 Am. Neg. Cas. 449; Kleiber *v.* People's R'y Co., 107 Mo. 240, 4 Am. Neg. Cas. 664; Buel *v.* N. Y. Cent. R. R. Co., 31 N. Y. 314, 5 Am. Neg. Cas. 87; Maverick *v.* Eighth Ave. R. R. Co., 36 N. Y. 378, 5 Am. Neg. Cas. 93; Twomley *v.* Central Park, N. & E. R. R. Co., 69 N. Y. 158, 5 Am. Neg. Cas. 217; Heath *v.* Glens Falls, S. H. & Ft. E. St. R'y Co., 71 N. Y. St. Rep. 29, 5 Am. Neg. Cas. 624; Morris *v.* N. Y., Ont. & W. R'y Co., 73 Hun, 560 (reversed in 148 N. Y. 88), 6 Am. Neg Cas. 35; Iron R. R. Co. *v.* Mowery, 36 Ohio St. 418, 6 Am. Neg. Cas. 176; Gulf, Colo. & S. F. R'y Co. *v.* Wallen, 65 Tex. 568, 6 Am. Neg. Cas. 538; Dallas Consol. Tr. R'y Co. *v.* Randolph, (Tex. Civ. App. 1894), 6 Am. Neg. Cas. 692, 27 S. W. 925; Pederson *v.* Seattle Consol. St. R'y Co., 6 Wash. 202, 7 Am. Neg. Cas. 77; Dimmey *v.* Wheeler & Elm Grove R. R. Co., 27 W. Va. 32, 7 Am. Neg. Cas. 111; Spicer *v.* Chicago & N. W. R'y Co., 29 Wis. 580, 7 Am. Neg. Cas. 187; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 7 Am. Neg. Cas. 297; Shankenbury *v.* Met. St. R'y Co., 46 Fed. Rep. 177, 7 Am. Neg. Cas. 579; Washington & G. R. R. Co. *v.* Hickey, 5 D. C. App. 436, 9 Am. Neg. Cas. 173; Frink *v.* Potter, 17 Ill. 406, 9 Am. Neg. Cas. 200; Galena & C. U. R. R. Co. *v.* Yarwood, 15 Ill. 468, 9 Am. Neg. Cas. 208; South Covington & Cin. St. R'y Co. *v.* Ware, 84 Ky. 267, 9 Am. Neg. Cas. 381; Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 9 Am. Neg. Cas. 426; St. Jos. & G. I. R. R. Co. *v.* Hedge, 44 Neb. 448, 9 Am. Neg. Cas. 550; N. Y., L. E. & W. R. R. Co. *v.* Ball, 53 N. J. L. 283, 9 Am. Neg. Cas. 575 (and note in 5 Am. Neg. Cas. 36); Smith *v.* British & N. A. R. M. Steam Packet Co., 86 N. Y. 408, 9 Am. Neg. Cas. 585 n.; Erickson *v.* Smith, 38 How. Pr. (N. Y.) 454, 9 Am. Neg. Cas. 587 n.; Gallagher *v.* Bowie, 66 Tex. 265, 10 Am. Neg. Cas. 254; Richmond R'y & Elect. R'y Co. *v.* Bowles, 92 Va. 738, 10 Am. Neg. Cas. 376; Beery *v.* Chicago & N. W. R'y Co.,

was a passenger upon this railroad, traveling from the town of Scotia to Alton. The railroad was a single-track road, and between these two points, while the train was going at the rate of eight or ten miles an hour, an approaching freight train disclosed itself in front, a few hundred feet distant, as it emerged from around a curve. A collision seemed certain, and the plaintiff, as well as others upon the train, escaped therefrom to the ground. In her efforts to escape the threatened danger she jumped or stepped from the train, fell upon the track, and rolled down an embankment, suffering great

73 Wis. 197, 10 Am. Neg. Cas. 523; Washington & Georgetown R. R. Co. *v.* Hickey (U. S. Sup. 1897), 1 Am. Neg. Rep. 758 (see also 9 Am. Neg. Cas. 173); Gannon *v.* N. Y., N. H. & H. R. R. Co. (Mass. 1899), 5 Am. Neg. Rep. 613; Willis *v.* Second Ave. Traction Co. (Pa. 1899), 5 Am. Neg. Rep. 245; Gradert *v.* Chicago & N. W. R'y Co. (Iowa, 1899), 6 Am. Neg. Rep. 501; Costigan *v.* Warren, B. & S. St. R'y Co. (Mass. 1899), 7 Am. Neg. Rep. 51; Bennett *v.* Long Island R. R. Co., 163 N. Y. 1, 7 Am. Neg. Rep. 478; Central of Ga. R'y Co. *v.* Edwards (Ga. 1900), 8 Am. Neg. Rep. 595.

Passenger jumping from street car to avoid danger from collision with wagon — Findings — Degree of care — Contributory negligence — Instructions. — In WANZER *v.* CHIPPEWA VALLEY ELECTRIC R. R. Co. *(Wisconsin, December, 1900)*, 84 N. W. Rep. 423, the facts are stated by CASSODAY, Ch. J., as follows: "This is an action to recover damages for personal injuries sustained by the plaintiff while riding as a passenger for hire on the defendant's electric car, by reason of its running into a load of hay, at 10 minutes after 8 o'clock on the evening of June 12, 1899. Issue being joined and trial had, the jury returned a special verdict to the effect: 1, that the defendant did, in the manner in which it operated the car in which the plaintiff was a passenger at the time of receiving her injuries, fail to exercise the highest degree of skill and care which a careful and vigilant man would observe in like circumstances, in the management of such business; 2, that such failure to exercise such skill and care was the proximate cause of the plaintiff's injuries, 2½, that a prudent person engaged in the business of the defendant, who exercised the utmost care and forethought for the safety of passengers, would not have foreseen, in the light of the attending circumstances, that an injury to the plaintiff would be the natural and probable result of operating the car as it was operated; 3, that the plaintiff was not guilty of any want of ordinary care which contributed to her injuries; 4, that the car in question could have been stopped, at the time and place where the accident occurred, by the use of all the appliances with which the car was equipped, inside of seventy-five feet; 4½, that McClellan's wagon proceeded northerly on the defendant's track at the time of the collision, about 175 feet; 5, that the motorman, Fox, by the exercise of the utmost care in performing his duty, could have avoided colliding with McClelland's wagon after he observed the same on the track; 6, that the defendant's conductor in charge of the car did not exercise that care which a careful and vigilant man in the same business, under like circumstances, would have exercised to prevent the plaintiff from leaving the car; 7, that they assessed the plaintiff's damages at $1,575. Questions 2½, 4, 4½, and 6 were submitted at the request of the defendant. Thereupon the plaintiff

personal injuries. Various questions are raised by this appeal upon the giving and refusing of certain instructions as to the law, and some rulings upon the admission and rejection of evidence are also assailed. It may be conceded that when the defendant attempted to operate two trains upon a single track at the same place and time. traveling in opposite directions, it was guilty of gross negligence. But defendant now insists that plaintiff was guilty of contributory negligence—First, in this: That if she had not jumped from the

moved the court, upon the minutes of the judge and such verdict, to order judgment in favor of the plaintiff and against the defendant, or to strike from the verdict the answer to question 2½, or to change the negative answer to that question to an affirmative answer, and then order judgment thereon in favor of the plaintiff and against the defendant, which several motions of the plaintiff the court denied, and the plaintiff then and there excepted. Thereupon the defendant moved the court for judgment on the verdict in favor of the defendant and against the plaintiff, dismissing the complaint, with costs, and also to strike out the affirmative answer to question No. 2, as being a conclusion of law and erroneous, and insert in lieu thereof a negative answer, and for judgment thereon in favor of the defendant and against the plaintiff, dismissing the complaint, with costs, and also to strike out the answers to questions Nos. 4 and 5, respectively, as not being sustained by the evidence, and for judgment in favor of the defendant upon the verdict so modified, dismissing the complaint, which several motions of the defendant to change and modify the verdict were each and all denied by the court, and the defendant then and there excepted. Thereupon the court ordered that judgment be entered in favor of the defendant, dismissing the complaint, on the verdict so rendered, with costs to be taxed against the plaintiff, to which ruling the plaintiff excepted."

As to whether the judgment in defendant's favor was supported by the findings the court said: "As indicated in the statement of facts, all the findings of the jury are in favor of the plaintiff, except the answer to question No. 2½; and that answer is in direct conflict with the answer of the jury, under the charge of the court, to question No. 2, as to the proximate cause of the plaintiff's injuries. Certainly the judgment is not supported by such conflicting findings upon a vital question in the case. Haas *v.* Railway Co., 41 Wis. 44; Fick *v.* Mulholland, 48 Wis. 310, 4 N. W. Rep. 527; Selleck *v.* Griswold, 49 Wis. 39, 5 N. W. Rep. 213; Burns *v.* Rolling-Mill Co., 60 Wis. 541, 19 N. W. Rep. 380; Goff *v.* Railroad Co., 86 Wis. 237, 56 N. W. Rep. 465; Darcey *v.* Lumber Co., 87 Wis. 245, 58 N. W. Rep. 382; Id., 91 Wis. 654, 65 N. W. Rep. 491."

Continuing, the court said: "Besides, there is another insurmountable objection to holding that the judgment for the defendant is supported by the findings of the jury; and that is that the answer of the jury to question No. 2½, upon which the defendant relies, does not embody the standard of care required of the defendant. There were several persons in the car besides the plaintiff. The defendant owed the same duty of care and forethought for the safety of all of them. If by the exercise of such care and forethought the defendant's employees, or any of them, in charge of the car, would have foreseen, in the light of the attending circumstances, that an injury to any of such passengers would be the natural and probable result of operating

train she would not have been injured, and, *ergo*, she should not have jumped; and, second, that, after having jumped, she should not have fallen and rolled down the embankment. When a passenger upon one railroad train observes a second train upon the same track a few hundred feet distant, the two trains rapidly approaching each other, danger is right at his elbow, and it behooves him to do something, and do it quickly. There is no time to enter into mental

the car as it was operated, and failed to do what they could to prevent such injury, then the defendant would be guilty of actionable negligence, whereas the question submitted and answered limited the defendant's care and forethought to the plaintiff alone."

On the point whether plaintiff was negligent in jumping from the car, the court said: "It appears that the other persons in the car remained until it stopped, and were uninjured. Manifestly, if the plaintiff had so remained in the car, she would not have been injured. But the flash, explosion, and collision were well calculated to shock a nervous person, as the plaintiff appears to have been. Such persons are liable and expected to ride upon street cars, as well as to travel upon the public highways. Oliver *v.* Town of La Valle, 36 Wis. 597; Stewart *v.* City of Ripon, 38 Wis. 584, 591. We assume that the reversal of the car and the consequent blowing out of the circuit breaker was not of itself actionable negligence. If that is so, then, if the plaintiff actually started out of the car, and was jumping or stepping therefrom, before the collision, and while the car was in motion, as testified to by the conductor, the collision was not the proximate cause of her injuries. But if the collision was caused by reason of the motorman's negligence, and she remained in her seat until after the collision, as detailed in her evidence, then she would not be precluded from a recovery by the mere fact that she unwisely attempted to escape from the car, instead of remaining quietly in the car. In other words, she is not precluded from a recovery merely for failing to choose what, after the result was ascertained, might seem to have been the best means of escape. Bishop *v.* Railroad Co., 92 Wis. 145, 65 N. W. Rep. 733; Wynn *v.* Railroad Co., 133 N. Y. 575, 30 N. E. Rep. 721. Besides, the jury found that the plaintiff was free from contributory negligence, and that finding is unchallenged."

Instructions as to degree of care required of carriers of passengers held to be erroneous, the rule as to such degree of care being held to be as stated in 1 Fetter, Carr. Pass., § 8, viz.: "For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted, and consistent with the practical prosecution of their business." Among the adjudications which fairly support such proposition are the following: Libby *v.* Railroad Co., 85 Me. 34, 44, 26 Atl. Rep. 943, 20 L. R. A. 812; Murray *v.* Railroad Co., 66 Conn. 512, 34 Atl. Rep. 506, 32 L. R. A. 539; Railroad Co. *v.* Byrum, 153 Ill. 131, 134, 2 Am. Neg. Cas. 719, 38 N. E. Rep. 578; Keller *v.* Railway Co., 149 Pa. St. 65, 24 Atl. Rep. 159; Fredericks *v.* Railroad Co., 157 Pa. St. 103, 27 Atl. Rep. 689, 22 L. R. A. 306; Railroad Co. *v.* Anderson, 72 Md. 519, 526, 527, 3 Am. Neg. Cas 706, 20 Atl. Rep. 2; Bowen *v.* Railroad Co., 18 N. Y. 408, 9 Am. Neg. Cas. 617 n. Judgment reversed.

calculations, mathematical or otherwise, as to whether or not it is best to stand your ground, and trust to some avertment of the collision, or, upon the contrary, to escape from the scene of the danger at the quickest possible moment. And the law recognizes that under these circumstances a man may do the wrong thing, his act thereby resulting in an injury to himself, and yet not be held guilty of contributory negligence. This principle of law may be thus stated: "If a railroad company so operates its trains as to place its passengers in situations apparently so dangerous and hazardous as to create in their minds a reasonable apprehension of peril and injury, and thereby excite their alarm, and induce them to make efforts to escape, and if in such efforts to escape they receive personal injuries, it is responsible in damages for its negligence." Under the circumstances of this case, tested by this principle of law, it was essentially a question of fact for the jury as to whether or not plaintiff was justified, in view of all the surrounding conditions, in jumping from the train.

The same principle of law may be invoked upon the second contention made as to contributory negligence. If the danger of collision is hanging right over a passenger's head, the proprieties and niceties usually demanded of passengers in alighting from trains certainly need not be observed to their full extent. Under those circumstances a person does not stand and ponder upon the order of his going, but goes at once. A safe or unsafe spot may be chosen upon which to alight from the cars. If the spot be unsafe and dangerous, that fact, of itself, will not necessarily defeat a right of recovery, even though a safe and secure spot was at hand, and equally ready of access. The plaintiff testifies that in jumping from the train she fell upon the track face downward, that danger still threatened her there, as the cars were liable to pass over her, and in rolling from the track she was carried down the embankment. Certainly this court will not hold, as matter of law, that her acts, under the circumstances detailed, amount to contributory negligence.

The complaint in this case is composed of three counts. The second count is to the effect that by reason of the threatened collision of the two trains, and fearing greater danger therefrom, said plaintiff, in her effort to escape from said car and avoid probable injury and death, was thrown with great violence upon the track of defendant's railroad, and was severely injured. Whatever may be said as to the insufficiency of the evidence to support the other counts of the pleading, there can be no question but that the evidence is sufficient to support the count to which we have referred. The jumping from the train by reason of the threatened collision,

the falling or being thrown upon the track, and the rolling from the track down the embankment, may be grouped as a single act, and it fairly fills the measure demanded by the allegation in the count to the effect that in escaping from the train she "was thrown upon the track and injured." Especially is this true when we consider that all this evidence went to the jury without a single objection to the effect that it was not within the pleadings.

Complaint is made of the refusal of the court to give an instruction which, among other matters, contained the following language: "I call your particular attention to these allegations of the complaint, and charge you that unless the plaintiff has shown by a preponderance of evidence that her injury was the result of a collision, then your verdict must be for defendant. In other words, the plaintiff having alleged in her complaint that the collision caused her injury, it is necessary that she should prove such allegation precisely as made; and in case of failure to do so plaintiff would not be entitled to recover even though the jury believed that defendant was negligent." The instruction was properly refused, for, as we have seen, the second count of the complaint contains no claim that the injury to plaintiff was directly occasioned by the collision. It was the attempt of plaintiff to escape from the threatened collision which resulted in her injury. The cause of action set out in the second count of the complaint in no way depended upon an actual collision of the two trains, and that count would have been equally as meritorious if no collision had ever taken place.

Defendant claims that it was "damaging" error to give the following instruction: "In this case all that is necessary for plaintiff to prove in the first instance is that she was a passenger in defendant's car, that said car came into collision with one of defendant's trains while they were being run by defendant, and that the injuries of plaintiff resulted by reason thereof. This establishes a *prima facie* case against the defendant. The burden of proof is then thrown upon the defendant, * * * and, if defendant has failed in this, they should find for plaintiff." This instruction contains a sound elementary principle of law applicable to common carriers, and no objection can be made to it. We have also examined with care the other instructions given and refused by the trial court, and find no valid objection to its action in dealing with them.

The witness who acted as a nurse for plaintiff during the first week after her injuries were received was asked the following question: "You may state any complaints of pain and suffering which you heard." The objection to this question upon the ground that the witness was not an expert amounts to nothing. No principle of

expert evidence is involved in the question. Neither do we consider the evidence objectionable as hearsay. Involuntary declarations and exclamations of a person's present pain and suffering are admissible as tending in some degree to show his physical condition. Of course, when these declarations only amount to statements of his past condition, they should be rejected. Bridge *v.* City of Oshkosh, 71 Wis. 363, 37 N. W. Rep. 409; Will *v.* Village of Mendon (Mich.), 66 N. W. Rep. 58. The question here proposed comes fairly within the true rule of law, and was proper. If the answer was too broad, as unresponsive to the question, the remedy of appellant is found in a motion to strike out. In view of the serious injury suffered by plaintiff as a result of the accident, the question and answer, as far as they were relevant, were matters of very minor importance under any circumstances. Regarding the testimony of Dr. Felt, the motion to strike out the answer of the witness came too late, even if it be conceded that the question was an improper one.

The car with the locomotive attachment upon which plaintiff was riding at the time of the accident was a crude affair. And it is now claimed by defendant that plaintiff, in riding upon such a train, waived certain rights to which she might have been entitled if riding upon an ordinary passenger train. The claim that plaintiff was extended the privilege of riding in the car is of no force. Defendant, in running this car, carried passengers for hire. Plaintiff paid her fare, and defendant was a common carrier in transporting her, subject to all the rules of law which bind a common carrier of passengers in the performance of its duty. Plaintiff waived no rights, and was entitled to the exercise of the same care upon the part of defendant looking to her safety as though she had taken passage upon a Pullman train. We find no error in the instructions bearing upon this branch of the case. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

CLARDY v. SOUTHERN RAILWAY COMPANY.

Supreme Court, Georgia, October, 1900.

PEDESTRIAN USING RAILROAD RIGHT OF WAY — TRESPASSER — STRUCK BY FLYING OBJECT. — A railway company is not liable to a pedestrian who, even as a licensee, uses its right of way as a footpath, for injuries occasioned by a blow from a stone which formed a portion of the ballast of the company's track, and which was casually dislodged from its place therein and hurled against him by a passing train (1).

(Syllabus by the Court.)

ERROR from Superior Court, Gordon County.

Action by Henry Clardy against the Southern Railway Company.

From judgment for defendant, plaintiff brings error. *Judgment affirmed.*

F. A. CANTRELL, W. R. RANKIN, and J. M. NEEL, for plaintiff in error.

SHUMATE & MADDOX, for defendant in error.

LUMPKIN, P. J. — The plaintiff in error excepted to the granting of a nonsuit. The evidence discloses that while walking along the right of way of the railway company he was injured by a piece of

1. For other actions relating to Persons Struck by Flying Objects, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

As to trespassers upon railroad tracks. — See HAMBRIGHT *v.* WESTERN & ATLANTIC R. R. Co. *(Georgia, October, 1900)*, 37 S. E. Rep. 99, where the syllabus by the court states the case as follows:

"The affirmative and positive testimony of witnesses as to the actual facts of a particular occurrence cannot be overcome by testimony which is negative in character, or consists of mere opinions.

"As to a trespasser walking upon the track of a railroad, the duty of observing ordinary care and diligence for his protection does not devolve upon the company's servants in charge of a train until his presence upon the track becomes known to them. Railway Co. *v.* Leach, 91 Ga. 419, 17 S. E. Rep. 619; Railway Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. Rep. 550, 26 L. R. A. 553.

"Applying the above rules to the evidence in the present case, it is manifest that the plaintiff was not entitled to a recovery, and the court, therefore, did not err in directing a verdict for the defendant." Judgment affirmed.

As to accident to licensee on private way. — See HAROBINE *v.* ABBOTT *(Massachusetts, October, 1900)*, 58 N. E. Rep. 284, action by Benjamin Harobine against William H. Abbott, for injuries received on a way across defendant's land, at the ends of which were signs saying, "Not a public street. Dangerous." From verdict directed for defendant, in Superior Court, Hampden County, plaintiff excepted, but exceptions overruled. KNOWLTON, J., in the course of his opinion, said: "This case is governed by the decision in Moffatt *v.* Kenney, 174 Mass. 311, 6

stone which was hurled against him by a passing train. This stone constituted a part of the ballast of the track, and was dislodged from its place therein, and thrown against the plaintiff, by the movement of the train. It further appeared that the place at which the injury was sustained was generally used by pedestrians as a footway. The plaintiff's theory was that, being a licensee, the railway company owed him the duty of so placing the material used in ballasting its track that it would not be thrown against him in the manner stated. It is not entirely clear to our minds that the plaintiff, on the occasion when he was hurt, was in any better position than that

Am. Neg. Rep. 564, 54 N. E. Rep. 850. All the facts relied on as grounds for a recovery in the present case existed in that case, and some of them seemed more favorable to the plaintiff than those now before us. The principles applicable to such cases have been discussed so often and so lately by this court that it is unnecessary to state them now. The plaintiff was injured on the defendant's land, where he had no rights except as a licensee. There was no invitation or inducement to the public to use the way by a representation that it was a public street which the public could use in the exercise of a legal right, and with an assurance that they would find there provisions for their safety, such as the law requires of the public authorities in the maintenance of public streets. The defendant had opened a way for his own convenience and the convenience of his tenants and those to whom he gave rights, and he had permitted others to pass over it merely as licensees. The signs at the ends of the way informed all persons coming there that they had not the rights enjoyed by the public in passing over public highways, and that they must pass at their own risk. If the signs were placed there by the city, and not by the defendant, they were as effectual to notify travelers that they were not on a public highway as if the defendant had maintained them. See also Stevens *v.* Nichols, 155 Mass. 472, 29 N. E. Rep. 1150, 15 L. R. A. 459." The court distinguished the case from D'Amico *v.* City of Boston, (Mass.) 58 N. E. Rep. 158, where the place at which plaintiff was injured had long been a public highway, and was left open for the public to be used, without notice of the discontinuance of the way, and without anything to indicate that it was no longer a public highway. It was actually in use by the public, and there was no other road open for travel between Fayville and Marlboro at that time. Moreover, the city of Boston was then under a contract with the town of Southboro to secure safe and convenient ways of travel between Southboro and the neighboring towns, and between the different parts of the town, during the progress of the work. This contract had been approved by an act of the legislature, and was binding upon the city. The conduct of the city, under the circumstances, was equivalent to a representation to the public that the road was still a public highway, and an invitation to use it as such in the expectation that it would be found safe.

In Moffatt *v.* Kenney, 174 Mass. 311, 6 Am. Neg. Rep. 564. it was held that a pedestrian injured from defects in a way dedicated to, but never accepted by, the city, that posted at the entrance a sign that the street was a private way and dangerous, cannot recover against an abutting owner, as the pedestrian was a mere licensee.

of a mere trespasser. But, granting that he should be regarded as a licensee, and that accordingly he was using the right of way under some sort of an implied invitation to do so, we are still confident that the judgment of nonsuit was right. Certainly it cannot be claimed that, under the facts appearing, it was incumbent on the railway company, relatively to the plaintiff's protection from injury, to exercise more than ordinary diligence. The dislodgment of the stone was a mere casualty. Other trains had passed over the spot where it lay without dislodging it from its place, and, even under the theory that the company was under any duty at all of protecting pedestrians from being injured as the plaintiff was, it would at least have to appear that the company was wanting in ordinary care and prudence as to the manner in which its track was ballasted and kept in order. It would be going a great length to hold that such a theory was good law in any case, for railway companies can hardly be expected to construct or maintain their roadbeds with a view to protecting people who choose, even permissively, to walk along rights of way, from such a catastrophe as that which happened in the present instance. One who uses a railroad right of way as a pathway is surely chargeable with knowledge of the uses which the company ordinarily makes of property of this kind, and necessarily takes the risk of casualties occasioned by such use. If the defendant company ought to have foreseen the particular casualty of which the plaintiff complains, he, too, ought to have foreseen it, and selected some other and safer place to walk. No one would contend that a farmer who permitted a neighbor to use a private road across the premises of the former, and who, by driving over a stick in the roadway, unintentionally caused the stick to fly against and hurt his neighbor, who happened to be walking along the road at the time, would be liable in damages to the latter. The present case is, in principle, of just such a nature. One desiring indemnity for such a hurt as that which the plaintiff received should carry a policy in an accident insurance company.

Judgment affirmed. All the justices concurring.

HANER v. NORTHERN PACIFIC RAILWAY COMPANY.

Supreme Court, Idaho, November, 1900.

INJURY TO LIVE STOCK ON RAILROAD TRACK — EVIDENCE — PLEADING — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. — 1. Where the complaint alleges negligence only in the running, managing, and operating a locomotive and train of cars, the right of recovery is limited to the negligence alleged. As the well-settled rule is, the evidence must be confined to the issues made by the pleadings.

2. Where there is no evidence to establish the material issues of the complaint, the court, on motion of the defendant, ought to instruct the jury to return a verdict for the defendant.

3. Evidence ought not to be admitted of facts not put in issue by the pleadings.

4. Under the rule laid down in Minty *v.* Railway Co., 2 Idaho, 437, 21 Pac. Rep. 660, 4 L. R. A. 409, Rumpel *v.* Railway Co. (Idaho) 35 Pac. Rep. 702, 22 L. R. A. 725, and Railway Co. *v.* Holt (Idaho) 40 Pac. Rep. 56, it was error for the court to instruct the jury that the burden of proof was upon the defendant to establish contributory negligence on the part of plaintiff, as the plaintiff must allege and prove that the damage occurred without contributory negligence on his part (1).

5. When no interest is demanded in the complaint, it is error to instruct the jury to return a verdict for interest.

(Syllabus by the Court.)

APPEAL from District Court, Nez Perces County.

Action by Lizzie R. Haner against the Northern Pacific Railway Company. From judgment for plaintiff, defendant appeals. *Judgment reversed.*

JAMES E. BABB, STEPHENS & BURNS and ELLIS T. WHITE, for appellant.

THOMAS MULLEN, for respondent.

SULLIVAN, J. — This suit was brought to recover the value of a Jersey cow alleged to have been killed by the appellant because of

1. For other actions relating to the Killing of Live Stock on Railroad Tracks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Live stock killed by railroad trains — Presumption of negligence — Burden of proof — Statute. — In Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Mississippi, North Carolina, North Dakota, South Dakota, Texas, and Washington statutes have been enacted directing that the mere fact of an injury to animals on railroad tracks by trains establishes a presumption of negligence against the railroad company, which can only be removed by affirmative evidence that it used ordinary care. See Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196; Louisville, etc., R. Co. *v.* Kelsey, 89 Ala. 287; Memphis, etc., R. Co. *v.* Jones, 36 Ark. 87;

the negligent and careless running of a locomotive and train of cars. The complaint alleges that said cow casually and without the fault of plaintiff strayed in and upon the track and grounds occupied by the railroad of defendant, about two miles east of the city of Lewiston, upon what is known as the "Delsol Land." The complaint further alleges as the ground of the liability of the defendant that defendant, "not regarding its duty, so negligently and carelessly ran, managed, and operated its said locomotives, trains, and cars that the same ran against and over the said cow and killed the same." The amended answer of defendant puts in issue the allegations of the complaint. The case was tried by the court with a jury, and verdict and judgment was entered in favor of the plaintiff. This appeal is from the judgment, and was taken within sixty days after the entry thereof.

The evidence of the plaintiff shows the ownership and value of the cow; that on the morning of the 30th of September, 1898, the cow left home before she had been milked. Children were sent to find her, and found her lying near the railroad track, in a badly bruised and helpless condition. The only eyewitness to the striking of the cow by appellant's locomotive, who testified in the case, was George A. King, the fireman on said locomotive. None of plaintiff's witnesses saw the accident, and they knew nothing of it, except that the animal was found in a helpless condition near the railroad track. The testimony of said King, which was uncontradicted or unimpeached, is to the effect that the train of cars referred

St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451; St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122; Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344; Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 567; Georgia, etc., R. Co. *v.* Parks, 91 Ga. 71; Georgia, etc., R. Co. *v.* Middlebrooks, 91 Ga. 76; Ala., etc., R. Co. *v.* Blivens, 92 Ga. 522; Wall *v.* Des Moines, etc., R. Co., 89 Iowa, 193; Ky., etc., R. Co. *v.* Talbot, 78 Ky. 621; Grundy *v.* Louisville, etc., R. Co. (Ky.) 2 S. W. Rep. 899; Louisville, etc., R. Co. *v.* Smith, 67 Miss. 15; Pippen *v.* Wilm., etc., R. Co., 75 N. C. 54; Randall *v.* Richmond, etc., R. Co., 107 N. C. 748; Huber *v.* Chicago, etc., R. Co., 6 Dak. 392; Bates *v.* Fremont, etc., R. Co., 4 S. D. 394; Jolliffe *v.* Brown, 14 Wash. St. 155.

See also the following statutes as to presumption of negligence in livestock cases: Arkansas: Sandels & Hill Dig. Stat. 1894, § 6356; Dakotas: Code Civ. Pro., § 679; Iowa: Code, § 1289; Kentucky: Gen. St., ch. 57, § 5; Mississippi: Code, § 1059; North Carolina: Code 1883, § 2326; Texas: Rev. St. 1895, art. 4527–4528; Washington: Laws 1893, p. 418.

But, except in South Carolina, no such presumption exists at common law, in favor of cattle straying upon the premises of a railroad company, even in those States which recognize the right of cattle to be at large. See 2 Shearm. & Redf. Negl. (5 ed.), ch. 20, §§ 418–456, pp. 707–770, relating to railroad injuries to animals.

to consisted of twenty-one cars, and that the train was running at a speed of about twenty-five miles an hour when the cow was first seen; that she came upon the track from the south side, from behind a line of trees and brush; that it was impossible to see her before she came out from behind the brush; that she came running out from behind the brush, and very suddenly ran upon the track; that the train was within 300 feet of her at the time it was first possible to see her. It is shown that the track was substantially straight for some distance in the direction from which the train was coming, before reaching the point where the cow was struck, and that the trees and brush stood so close to the track as to preclude possibility of seeing the cow until she ran out from behind them and rushed upon the track. The rules of the company permitted said train to run thirty miles an hour, and at the time said cow was first seen the train was running about twenty-five miles per hour. It is also shown that as soon as the cow was seen the whistle was blown, and an emergency application of brakes made, to stop the train. It is also shown that it was impossible to stop the train after the cow was seen before the train struck her, and that when the cow was struck the speed of the train had been reduced to about ten or twelve miles an hour. The testimony shows that the cow was allowed to run at large on the public highway and elsewhere, without any attention, from the time she was turned out in the morning until she was gotten up in the evening, and that the plaintiff had full knowledge of the existence of the railroad track and the running of trains over the same in the vicinity where the cow was permitted to run at large.

Seven errors are assigned, six of which refer to the instructions given and refused by the court, and one to the admission of certain evidence, and a refusal to strike such evidence out after it was let in. It is above shown that the plaintiff seeks to recover for the negligent and careless killing of a cow, and the complaint charges negligence only in running, managing and operating a locomotive and train of cars. The right to recover is limited to the negligence alleged. The court admitted, over the objection of appellant, evidence tending to prove that appellant had not fenced its track at the point where the cow was killed, as required by the provisions of section 2670, Rev. St. Evidence was also admitted, over the objection of defendant, that a highway crossed the railroad track near where the cow was killed — all of which is assigned as error. As the negligence alleged in the complaint consisted of the running, managing, and operating its locomotive and train, the right to recover is limited to the negligence alleged in the complaint, and

cannot, without amending the complaint, be shifted to negligence in fencing its track, or failure to ring the bell and sound the whistle at points where public highways cross the track.

At the close of all of the evidence the appellant moved the court to instruct the jury to return a verdict for the appellant, which motion was denied. The denial of said motion is assigned as error. We have carefully examined the evidence, and find no proof whatever sustaining the allegation of the complaint to the effect that said cow was killed by the negligent and careless running of appellant's locomotive and train of cars. The right to recover in this suit is predicated upon the issues made by the pleadings, and must be confined to those issues. No issue was made as to whether the killing of the cow occurred because of appellant's failure to fence its track, or because of a failure to ring the bell or sound the whistle at public highway crossings, as required by law, and it is prejudicial error to admit evidence upon said two points.

The court instructed the jury that the burden of proof was upon the defendant to establish contributory negligence on the part of plaintiff, which instruction is assigned as error. In Minty *v.* Railway Co., 2 Idaho, 437, 21 Pac. Rep. 660, 4 L. R. A. 409, our territorial Supreme Court held that one seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the defendant, and due care on plaintiff's part. The rule there laid down has been followed by this court in Rumpel *v.* Railway Co. [Idaho], 35 Pac. Rep. 702, 22 L. R. A. 725, and Railway Co. *v.* Holt [Idaho], 40 Pac. Rep. 56. The rule laid down in those cases is upon the theory that, as plaintiff cannot recover if he is guilty of contributory negligence, he must allege and show that the damage occurred without fault on his part. Under the rule established in said cited cases, the giving of the instruction referred to was error.

As interest on the value of the cow was not claimed by the plaintiff in her complaint, it was error to instruct the jury, if they found for the plaintiff, to return a verdict for interest. However, the giving of said instruction was not prejudicial error, as no judgment was entered for interest.

The court erred in refusing to instruct the jury at the close of the evidence to bring in a verdict for the defendant. That being true, it also erred in submitting to the jury the question whether the train could have been stopped, with the exercise of ordinary care, after the presence of the animal was discovered on or near the track, and before it was struck. All of the evidence clearly shows

that it could not have been stopped. The judgment is reversed and the case remanded, with costs of this appeal in favor of appellant.

HUSTON, Ch. J, concurs, and QUARLES, J., concurs in conclusion reached.

QUARLES, J. — I concur in the conclusion reached in this case, but am unable to concur in all of the views expressed. I believe with my associates that under the provisions of our Code the actual elements upon which damages are recovered in a case of this kind should be pleaded in the complaint. The spirit of our Code and of our practice, so far as pleadings are concerned, is that each party to the action shall be notified in advance of the facts which his adversary expects to prove at the trial. This is only fairness to both parties. The opinion in this case holds that the judgment and verdict should be set aside and a new trial granted because at the trial the plaintiff was permitted to prove facts showing negligence on the part of the defendant, without those facts having been pleaded in the complaint, thus giving the defendant no notice that evidence would be introduced to prove such facts. That course was manifestly unfair to the defendant. Thus far I concur in the majority opinion. But I am unable to give my assent to the proposition that, before the plaintiff can recover damages based upon the negligence of the defendant, he must allege and prove that he is not guilty of contributory negligence. The great weight of authority is against this rule. The great weight of authority is to the effect that contributory negligence upon the part of the plaintiff is a defense, and must be pleaded by the defendant as a defense, and that the burden of proving contributory negligence is upon the defendant. To my mind, this is the correct rule. Under this rule the defendant, in its answer in this case, if it relies upon specific acts constituting contributory negligence upon the part of the plaintiff, would have to plead those acts in its answer, and thus notify the plaintiff, in advance of the trial, of the facts it expected to prove showing contributory negligence, thus giving to the plaintiff the opportunity to meet such defense. This rule is fair to the plaintiff, and in accord with the spirit of our Code. But the rule enunciated in the majority opinion, to the effect that the plaintiff must allege and prove a negative, and that the burden of proving such negative, to wit, "that the plaintiff has not been guilty of contributory negligence." is upon the plaintiff, virtually makes it unnecessary for the defendant to say anything in its answer about contributory negligence, and leaves the door wide open for the defendant at the trial to prove facts showing contributory negligence on the part of the plaintiff, without the plaintiff having had

any notice whatever that such facts would be put in proof or in issue at the trial. The rule to which I cannot assent, believing it to be erroneous, was adopted by the territorial predecessor of this court, and I think has been inconsiderately followed through deference to the territorial Supreme Court. I think it would be the proper thing to overrule the decisions of this court touching the rule under consideration, and carry out fully the manifest intent and spirit of our Code, so far as making up the issues between parties to an action, in their pleadings, is concerned.

WEST CHICAGO STREET RAILROAD COMPANY v. TORPE.

Supreme Court, Illinois, October, 1900.

PERSON KILLED WHILE ATTEMPTING TO BOARD STREET CAR — RATE OF SPEED — CUSTOM — EVIDENCE. — Where the main controversy, on the trial of an action for injuries resulting in the death of plaintiff's intestate as he was trying to board one of defendant's street cars, was over the rate of speed at which the car was going at the time of the accident, it was error to permit plaintiff to corroborate the testimony of his witnesses on that issue, by proving that at other times the cars of defendant ran slowly or stopped at this particular point for the purpose of receiving passengers, as even if such custom did exist, and deceased knew the same, such facts would not justify deceased in attempting to board a cable car running at full speed past said point, though the same was so run in disregard of such custom (1).

MAGRUDER, J., *dissented*.

1. For actions relating to Persons Injured While Alighting from or Boarding Street Cars, Trains, etc., from the earliest period to 1897, see vols. 2–7 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. The *Illinois* cases appear in vol. 2 Am. Neg. Cas. Subsequent actions on the same topics are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Among recent actions relating to persons injured while alighting from or boarding street cars, trains, etc., are the following:

Trespasser jumping from moving train — Erroneous instruction. — In WESTERN & ATLANTIC R. R. CO. *v.* HOLSOMBACK *(Georgia, October, 1900)*, 37 S. E. Rep. 128, the syllabus by the court states the case as follows: "It was on the trial of an action for personal injuries brought by a young man about twenty years of age, and involving the question whether or not, under given circumstances, he was justified in jumping from a moving train, erroneous to instruct the jury that they might take into consideration whether or not he was "a man or a boy." While the determination of the question above

APPEAL from Appellate Court, First District.

Action by August Torpe, administrator, against the West Chicago Street Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. *Judgment reversed.*

JOHN A. ROSE and LOUIS BOISOT, JR. (W. W. GURLEY, of counsel), for appellant.

DOUTHART & BRENDECKE and VOLLMER & CAMELON, for appellee.

HAND, J. — This is an action on the case for negligence resulting in the death of appellee's intestate. Verdict of jury and judgment

indicated may have depended upon the age, experience, intelligence, and other characteristics of the plaintiff as evidenced by his appearance and the facts brought out at the trial, there was no issue of manhood or childhood in such a case, and the use by the court of the phrase above quoted was, in effect, submitting such an issue to the jury." Judgment for plaintiff for $500 reversed.

Alighting from street car — Sudden start — Passenger — In GAFFNEY *v.* ST. PAUL CITY R'Y CO. *(Minnesota, December, 1900)*, 84 N. W. Rep. 304, the complaint alleged that on August 24, 1899, the plaintiff was lawfully taking passage upon one of the defendant's passenger cars at Seven Corners, in the city of St. Paul, when the defendant negligently and without warning suddenly started the car while she was upon the step thereof, whereby she was thrown to the ground and injured. The answer put in issue these allegations, and affirmatively alleged that any injuries the defendant may have sustained were caused by her own negligence. Verdict for the plaintiff for $1,000, and the defendant appealed from an order denying its motion for judgment or for a new trial. On appeal the judgment was affirmed. The syllabus by the court stated the case as follows:

"This is a personal injury action, in which it is *held:*

"That the question as to the negligence of the defendant and that of the plaintiff, and whether she was a passenger at the time she was injured, was one of fact, and that the verdict is sustained by the evidence.

"If a street car stops at a usual place for passengers, and a person in the exercise of due care gets upon the steps or platform of the car, for the purpose of taking passage, while it is so waiting, he is to be regarded as a passenger.

"That instructions to a jury ought to be simple, clear, and direct in statement, and, so far as practicable, in a concrete form, and that the trial court did not err in refusing certain requested instructions by the defendant as to what constituted a passenger, and the duty of its conductor in the premises."

Alighting from train — Sudden start — Evidence. — In CLARK *v.* SMITH *et al.*, RECEIVERS OF CENTRAL VERMONT R. R. CO. *(Vermont, March, 1900)*, 47 Atl. Rep. 391, the case is stated by TAFT Ch. J. (per opinion by the court), as follows: "The plaintiff claimed that his intestate was a passenger on the defendant's train from Brattleboro to Londonderry; that when the train reached Jamaica orders were given for the passengers to change cars; that the intestate arose from her seat for that purpose, and stood in or near the door of the car; that the train had stopped, and was then so suddenly started and again stopped that in consequence she was thrown through the door to the ground, and so injured that she died two days after. The testimony of all the witnesses tended to show that the

of the court thereon for appellee, appeal to the Appellate Court for the First District, judgment of that court affirming the judgment of the Circuit Court, and appeal from that judgment to this court.

The declaration consists of two counts. The first count alleges that, while the deceased was mounted upon the step of a certain train of cars of the defendant, the defendant's gripman negligently started said train suddenly forward at a great and unlawful rate of speed, so that the deceased was thrown off and killed. The second count alleges that while the deceased was attempting to mount, and was mounting the said train of cars, the defendant's gripman negligently started said train suddenly forward at a great and unlawful rate of speed, so that the deceased was thrown off and killed. The evidence showed that the deceased met his death by being run over

train had stopped at the time of the accident; that it had come to a standstill before the decedent started to leave the car. The testimony of the plaintiff's witnesses tended to show that the train, after stopping, was suddenly started; that, as the witnesses described it, they (the trainmen) gave a 'yank' to the train. One of the witnesses described it as a 'jolt,' and another as a 'slight snap,' and that the train went four or five feet, and then stopped. One witness said the train started, and gave a sudden stop, and the decedent fell out of the door. One of the witnesses testified that when the train had come to a standstill the decedent 'had got up first, and stepped over the bench, and got to the door, as the car gave a jolt and threw her out of the door.' The testimony of the defendants tended to show that after the train came to a standstill there was no movement of the train until after the passengers went out of the car which they intended to and did leave at the Jamaica station, and that the decedent fell in attempting to go out of the car when the car was not in motion. In this situation of the case, testimony was admitted to show how the train was handled on the way from Brattleboro to Jamaica, and that the train was jerked violently at other stations, for the purpose of characterizing the way the trainmen were handling the train, the management of it, and the way it was under control. The court said it might 'be material as showing the condition of the train as affected by the running. How the train was managed at other stations had no tendency to show how it was managed at Jamaica. That it was jerked violently at other stations had no tendency to show that when standing still at Jamaica it was suddenly started and then stopped in the manner the plaintiff claims it was at the time of the accident, and such testimony was not relevant upon the question of the condition of the train. How it was running at other stations was collateral to the issue on trial, and its admission was error. There having been error upon the trial in this respect renders it unnecessary for us to consider the question in respect to damages. Judgment [for plaintiff] reversed, and cause remanded for a new trial."

Boarding street car — Duty of passenger.— In WALKER *v.* ST. PAUL CITY R'Y CO. *(Minnesota, November, 1900)*, 84 N. W. Rep. 222, action for damages sustained by plaintiff while attempting to take passage on one of defendant's Interurban cars, plaintiff had a verdict. After motion for judgment upon the verdict, or for a new trial in the alternative, which were denied, defendant

by one of the appellant's cable cars about 6 o'clock P. M., December 17, 1894, on West Madison street, in the city of Chicago, between Rockwell street and Campbell avenue, a short distance east of appellant's power house. West Madison street runs east and west, having on it a double street-car track. The car that ran over the deceased was eastward bound, and was the rear trailer of a cable train consisting of a grip car and two trailers. The testimony on behalf of appellee tended to show that the train in question slowed up in order to receive the deceased as a passenger; that thereupon he stepped with one foot upon the lower step of the car, holding onto the car with both hands; that before he could fully mount the car the train suddenly started with a jerk, throwing him off, so that he was dragged under the car feet first, run over, and killed. The

appealed. Judgment affirmed The syllabus by the court states the case as follows:

"It is not the duty of a person seeking passage on an electric street car to assume that proper signals to stop the car will be disregarded, but such passenger may have regard to the probable conduct of the person in charge of the car, and act accordingly, when such reliance is not apparently attended with danger.

"It is not, as a matter of law, negligence for a person intending to take passage on a street car to assume that such car is running at the customary rate of speed, and to act with reference to such custom, in the absence of evidence to the contrary.

"Evidence considered, and *held* to support the finding of the jury that defendant negligently disregarded signals to stop one of its electric cars, which was run at a reckless rate of speed past the proper stopping place, and that plaintiff was not negligent, under the facts found by the jury in this case, in passing before such car, when intending to enter the same as a passenger." COLLINS and BROWN, JJ., dissented.

Passenger injured — Boarding train — Sudden start — Reasonable care of employees. — In KULMAN *v.* ERIE R. R. Co. (*New Jersey Err. and App., November, 1900*). 47 Atl. Rep. 497, it appeared that plaintiff had his foot cut off by a train of cars at the defendant's station. The declaration alleged that the plaintiff was a passenger in the defendant's train, and that the defendant negligently caused its train to start after he had boarded it, and before he had reached a place of safety, whereby he was thrown under the wheels of the train and injured. There was a verdict for the plaintiff. On appeal judgment was affirmed. The syllabus by the court states the case as follows:

"Upon the trial of an action against a railroad company for the negligent manner in which its train was started from a station, there was conflicting testimony from which the jury might conclude that the plaintiff boarded the defendant's train as a passenger at its Paterson station; that the train was not in motion when he stepped upon the lowest step of a car platform; that the platform and step were crowded with passengers; that in this condition the train started upon signals previously given by the conductor and brakeman; that by the starting of the train the passenger in front of the plaintiff was thrown against him and knocked off the step, and that the conductor and brakeman, who had stationed themselves

testimony for appellant tended to show that the deceased attempted to catch hold of the first trailer as it passed him at full speed in the middle of the block, fell head foremost in front of the last trailer, and was run over and killed.

On the trial of this case appellee introduced, over appellant's objection, evidence tending to show that appellant had a custom of stopping its cars near the point where appellant's intestate was killed, for the purpose of taking on passengers.

Appellant assigns as error the admission of such testimony, and relies solely upon such assignment for a reversal of this case.

The main controversy on the trial in the court below was over the

between the car steps to see to the loading of the train, had, after signaling to the engineer, left their posts and entered the cars before the train actually started, so that they did not see the plaintiff at all. *Held*, that this was evidence to go to the jury upon the question whether the servants of the defendant had failed to use reasonable care to see that the plaintiff was not in such a position that he would be likely to be endangered by the starting of the train, and that a motion to nonsuit the plaintiff and a motion to direct a verdict for the defendant were each properly refused."

Child injured while boarding street car — Sudden start. — In STATE (HERBICH) *v.* NORTH JERSEY STREET R'Y CO. *(New Jersey Supreme Court, November, 1900).* 47 Atl. Rep. 427, the opinion by the court (per GUMMERE, J.), states the case as follows: "The case presented by the plaintiff, who was a very young child, was that she was thrown from an electric car of the defendant company, after she had entered it as a passenger in the charge of her mother, by the negligence of the employees who were operating it, and was very seriously injured. The negligence alleged was that the car was started before she had been afforded an opportunity to be seated, and, further, that it was started with a sudden and violent jerk. There was a judgment for the plaintiff, and this writ of error is sued out to test its validity. In disposing of the case, it will be necessary to consider but one of the numerous assignments of error which have been filed, namely, the refusal of the trial judge to charge the jury that "the starting of a car before a passenger is seated is not negligence." Not only was this request refused, but it was left to the jury to say whether it was negligence to start a car while the plaintiff was on her way to a seat. I think that the refusal to charge this request was error. It is a matter of common experience that thousands of people daily ride in these cars without being seated, and that their doing so is unaccompanied by any danger; that while they are doing so the cars are stopped and started again at every street corner with perfect safety to such travelers. It may, perhaps, be that a greater degree of care in the starting of a car is required when some of the passengers are standing than when they are seated, but it is no part of the duty of these companies to refuse to carry on their cars more passengers than can be seated therein, or to delay starting them while any of such passengers remain standing. And this is equally true in the case of a child non sui juris, accompanied by and in the care of its parents, as in that of an adult. The judgment below should be reversed."

rate of speed at which the train which passed over the deceased was going at the time he attempted to mount the same. A number of witnesses testified on behalf of appellee that the same was moving very slowly at that time, while a number testify on behalf of appellant that the same was moving very rapidly and at full speed. All agree that it was moving. The rapidity with which such cars were moving at the time the deceased undertook to mount the same was important. To permit the appellee to corroborate the testimony of his witnesses who had testified upon that issue, by proving that at other times the trains of the appellant ran slowly or stopped at this particular point for the purpose of receiving passengers, is, in our judgment, prejudicial error. The case of Railroad Co. *v.* Lee, 60 Ill. 501, is an action on the case, wherein the negligence alleged was the failure to ring the bell or sound the whistle as the train approached the crossing where the injury took place. In order to show such failure, evidence was introduced that trains had at other times passed that crossing without ringing a bell. This court held such evidence wrongly admitted, and say (page 504): "From the fact of omitting to ring the bell at any previous time, no reasonable inference could be drawn that it was not rung on the occasion in question." A vital point in issue in that case was whether there was a failure to ring the bell at the time of the injury. The vital point in issue in this case is the rate of speed at which the cars were going at the time the deceased attempted to mount the same. If, as the witnesses for appellant testify, the cars were going at a full rate of speed when the deceased attempted to mount the same, this testimony could not be legitimately overcome by testimony that cars passing this place on the day previous, or at some other time, stopped or ran slowly. In the case of Railway Co. *v.* Clayberg, 107 Ill. 644, which was an action on the case for negligence resulting in the death of the plaintiff's intestate, the defendant sought to show that at the time of the injury the deceased was not observing due care for his own protection, by proving that before that time he was in the habit of jumping on trains. The court held such evidence inadmissible, and say (page 649): "No authority is referred to sanctioning the admission of such evidence, and we are not aware of any. Its effect is clearly to raise a collateral and immaterial issue. If such evidence is admissible, to prove negligence on the part of the plaintiff's intestate, then the same character of evidence must be admissible to prove negligence on the part of the defendant, which has been condemned by the entire weight of judicial authority."

It is contended that such evidence was proper and material to be

considered by the jury in determining whether or not, in view of the conflict in the evidence, the particular train of appellant moved slowly or rapidly at the time in question. That was one of the issues being tried. Witnesses who saw the train at the time of the injury had testified with reference thereto. There was a conflict upon that proposition, and we are unable to see how testimony of the manner in which trains were handled at this particular place at other times tended legitimately to show the manner in which the particular train by which the deceased was injured was handled at the time of the injury.

It is further suggested that the testimony is proper as tending to show that appellant was accustomed to slow up or stop its trains at that point, and that there was evidence in the record from which it might be inferred that deceased knew of such custom. If it were admitted that such custom did exist, and the deceased knew the same, such facts would not justify the deceased in attempting to mount a cable train running at full speed past said point, even though the same was so run in disregard of such custom. We are of the opinion that the only effect of this testimony upon the minds of the jury was to lead them to believe that, if the trains of appellant were stopped or run slowly at other times at the place where the injury took place, such facts were proof of the rate of speed at which such train was running at the time deceased attempted to mount the same and was killed. We are of the opinion the same was not proper evidence, and that the court erred in admitting the same. The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court for another trial consistent with this opinion. Reversed and remanded.

MAGRUDER, J. (dissenting). — I think that the judgment of the Appellate Court ought to be affirmed, and that that court correctly disposed of the questions involved, as will appear from the following extract from its opinion, to wit: "The evidence on the question of care on the part of deceased and the negligence of appellant is conflicting. We are of opinion from a careful reading and consideration of the evidence, in the light of the arguments of counsel, that there was sufficient proof to justify the submission of the case to the jury under the second count of the declaration. There is evidence tending to show that deceased signaled the gripman to stop the train at a time and under circumstances when he must have seen the signal; that the train was slackened in its speed, one of the witnesses testifying that it was going very slow, and another that it was coming near a stop and was going very slow, and another that the train was just moving; and that the gripman, just as

deceased was in the act of getting upon the step of the car, suddenly and violently started the train forward at a great rate of speed, one of the witnesses testifying that the car gave a lunge ahead just as deceased went to get on, when he had one foot on the step, and had hold of the car with each hand; another witness testifying that upon a quick signal given by the conductor, when the car was going very slow, the car lunged forward; and still another that, as the car came near a standstill, deceased took hold of the handle bar on the front end of the first trailer, the car was then signaled by the conductor to go ahead, when the gripman started the car with such force that the man's foot slipped off the step right around against the side of the car, and also that when the signal was given the car 'lunged right forward, and it jerked him off.' It is true the evidence on behalf of appellant tends to show that deceased attempted to get upon the moving train while it was going at the rate of seven or eight miles per hour, that he gave no signal to the gripman, that there were signals given by both whistle and bell for the train to move forward, and that the gripman did not see the deceased when he attempted to board the moving train; but these matters were all peculiarly for the consideration of the jury, and we cannot say, after a careful reading and consideration of the evidence, that it shows either that the deceased was guilty of contributory negligence, or that it fails to show negligence on the part of appellant's gripman which would justify the verdict of the jury. The fact that deceased attempted to board the train while it was moving slowly, as the witnesses for appellee say, does not, as matter of law, show a want of ordinary care. Whether there was such want of ordinary care was for the jury. Railway Co. *v.* Meixner, 160 Ill. 320, 43 N. E. Rep. 823, 31 L. R. A. 331; Railroad Co. *v.* Wiswell, 168 Ill. 613, 48 N. E. Rep. 407; Railway Co. *v.* Williams, 140 Ill. 281, 29 N. E. Rep. 672 (1); Railway Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. Rep. 884. If appellant's gripman slowed up his train, and then, when deceased attempted to board it, the gripman started up with a jerk or lunge, as the witnesses testify, and when he knew that deceased was in the act of getting on, it would be negligence for which appellant would be liable. Meixner Case, *supra;* Railroad *v.* Manning, 170 Ill. 417, 48 N. E. Rep. 958; Hoeffner Case, *supra.* The evidence which it is claimed the court erred in admitting is of a custom or habit of appellant of stopping its trains at or near the place of the accident. The contention is that, as the evidence did not show that deceased knew of such custom, it was incompetent

1. North Chicago St. R. Co. *v.* Williams, 140 Ill. 281, is reported in 2 Am. Neg. Cas. 684.

and prejudicial error. We think this contention is not tenable, and that the evidence was proper and material to be considered by the jury in determining whether or not, in view of the conflict in the evidence, the particular train of appellant moved slowly or rapidly at the time in question, and besides there was evidence from which it might have been inferred deceased knew of such custom. The only other matter of procedure of which complaint is made was as to the admission of the testimony of a witness who testified as to this custom, and admitted on cross-examination that he did not know whether or not the cars stopped always, or only when they were ahead of time; there being a motion by appellant, after the cross-examination, to strike out the evidence of the witness. We think there was no error in this regard. The evidence tended to prove that there was such custom, if the trains stopped at this place when they were ahead of time. The judgment of the Circuit Court is affirmed."

BESS ET UX. V. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

Supreme Court, Kansas, December, 1900.

CHILD KILLED WHILE CROSSING TRACK — CONTRIBUTORY NEGLIGENCE. — 1. In determining whether a person has been guilty of acts amounting to contributory negligence, his age is of no significance, except as a mark of capacity. In an action for personal injury to an infant it is not error for the court to take the case from the jury where it clearly appears that the child had a capacity for self-protection which it culpably omitted to use in face of danger which it knew and sufficiently appreciated (1).

2. The case of Biggs *v.* Consolidated Barb-Wire Co., 60 Kan. 217 5 Am. Neg. Rep. 335, 56 Pac. Rep. 4, 44 L. R. A. 655, distinguished.

(Syllabus by the Court.)

1. For other actions relating to Children Injured on Tracks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Accidents to children on track.—Among recent actions relating to accidents to children while crossing tracks, see the following:

In KANSAS CITY SUBURBAN BELT R'Y CO. *v.* HERMAN *(Kansas Appeals, October, 1900)*, 62 Pac. Rep. 543, an action to recover damages for injuries to plaintiff's son, who was about four and one-quarter years old at the time of the accident, it was *held* that it was not error for the court to charge that defendant was negligent in running its cars at a speed of more than six miles an hour, in violation of the city ordinance, and the jury was justified in finding from the evidence that if the

ERROR from District Court, Leavenworth County.

Action by Charles A. Bess and wife against the Atchison, Topeka & Santa Fe Railway Company. From judgment for defendant, plaintiffs bring error. *Judgment affirmed.*

"The plaintiffs below, plaintiffs in error here, were the parents of Claude D. Bess, a minor, who at the time of his death was fifteen years and ten months old. Between the place of residence of the deceased and the business part of the city of Leavenworth there were situated many railroad tracks and switches owned by the defendant company, over which they operated their engines and cars. A part of these tracks crossed Seneca street at and near its intersection with Eighth street. On or near Seneca street, about

train had been running at a rate of speed not in excess of six miles an hour, it could have been stopped in time to avoid the injury. *Held*, also, that a child about four and one-quarter years old, was not of sufficient age and discretion to be guilty of contributory negligence in trespassing on railroad track. Judgment for plaintiff for $1,999 affirmed.

In BUTLER *v.* NEW YORK, NEW HAVEN & HUDSON RIVER R. R. Co. *(Massachusetts, November, 1900)*, 58 N. E. Rep. 592, an action to recover damages for the death of the plaintiff's son, a child about four and one-half years old, who was killed on a grade crossing by one of defendants' trains, it was held that the question whether the child was exercising the care of a prudent boy of his years was for the jury, and it was not error for trial court to refuse to take the case from the jury. HOLMES, Ch. J., in the course of his opinion, said: "There was evidence tending to show that the boy was killed on a grade crossing by one of the rear cars of a freight train which had broken apart before reaching the crossing, and that the forward part of the train had gone by, leaving an interval of from 32 feet to 200 yards. It is not argued that there was not evidence of negligence on the part of the defendant, subject to the almost inseparable question of the boy's due care. But the boy was only four years and seven months old, and it is contended that there was a lack of due care on his part, and on the part of his mother. His mother was a poor woman, and was alone in the house. Five minutes before the accident, she left the boy eating on her front doorstep, with her two other children, aged nine and seven, told them to sit down and stay there, and went in to her washing. The house was about 200 feet from the track, and the earth was banked up on the side of the track so that cars could not be seen until one was very near. The track, however, was straight. The children, or the boy and his sister, went towards the track; and, according to her, the boy went on the track, and took off his hat, and said good-by to the part of the train that had passed. She called to him to come back, saying the cars were coming, and he replied: 'Why, the car has gone by. * * * It is passed now, and so there is no more' The boy's answer shows that he understood the danger from a train in motion to one upon the track. But we assume, in favor of the defendant, that he was not exercising such care as an adult would be bound to exercise under similar circumstances. The cars that killed him could have been seen before they reached the crossing, if he had looked. Railway Co. *v.* Wilson, 134 Ind. 95, 33 N. E. Rep. 793; McKinney *v.* Railway

sixty feet west of its intersection with Eighth street, the railroad company had put in what was called a 'three-throw switch.' By the throwing of this switch a train operated from the west towards Eighth street might be run or diverted to any one of the three different tracks running across that street. It was shown that many persons, including the deceased, were in the habit of walking over and along the tracks in question to get to the business part of the city. Eighth street runs north and south, and Seneca street east and west; and at the time the plaintiffs' son was struck by the cars he was about ten feet from Seneca street and forty-seven feet from Eighth street, on the private ground of the company, being lot 1 of block 16 of Roelofson subdivision to the city of Leavenworth. He had walked in an easterly direction from Tenth and Miami streets along the south side of the company's lead track. While he was so

Co., 87 Wis. 282, 58 N. W. Rep. 386; Guta *v.* Railway Co., 81 Mich. 291, 45 N. W. Rep. 821; 3 Elliott, R. R. 1166. On the other hand, the danger from detached cars following a train from which they have broken is so unusual, and the passing of the front part of the train had such a tendency to suggest that the track was safe, as, from his answer, the boy believed, that we cannot say, as matter of law, that he was not exercising the care of a prudent boy of his years. See O'Connor *v.* R. R. Co., 135 Mass. 352, 362; Elkins *v.* Railway Co., 115 Mass. 190, 199, 200; Breckenfelder *v.* Railway Co., 79 Mich. 560, 44 N. W. Rep. 957; Ward *v.* Railway Co., 85 Wis. 601, 55 N. W. Rep. 771." With regard to the care shown by the child's mother the court said: "The evidence warranted a finding that the mother reasonably might expect her children to obey her, and that leaving them where she did for the short time that she left them there, occupied as they were, was not negligence, in view of the facts that one of them was nine (Mulligan *v.* Curtis, 100 Mass. 512, 514), and that the boy had the degree of intelligence which his answer proved. The case falls into that border region between two extremes which we leave to the jury. McNeil *v.* Ice Co., 173 Mass. 570, 54 N. E. Rep. 257; Powers *v.* Railway Co., 163 Mass. 5, 39 N. E. Rep. 345; Creed *v.* Kendall, 156 Mass. 291, 31 N. E. Rep. 6; Lynch *v.* Smith, 104 Mass. 52, 56." Defendant's exceptions overruled.

In HOLDRIDGE *v.* MENDENHALL (*Wisconsin, October, 1900*), 83 N. W. Rep. 1109, action by George F. Holdridge against Luther Mendenhall, as receiver of the Duluth Street-Railway Company, judgment for plaintiff was reversed. The court (*per* WINSLOW, J.), stated the case as follows: "This is an action by a father to recover for the loss of services of his minor son. The evidence upon the trial showed that in June, 1900, the defendant, as receiver of the Duluth Street-Railway Company, was operating street cars upon street-railway tracks in the city of Superior, Wis.; that the plaintiff's son Rex, a boy about six years nine months of age, was struck by one of the defendant's street-railway cars on the 23d of June, 1900, and run over by the car, receiving serious injuries. The accident happened upon Tower avenue, which street runs directly north and south, and is the principal business street in the city of Superior, at a point 130 feet south of the intersection of Tower avenue with an east and west street called 'Belknap Street.' Tower

walking, the employees of the railway company were engaged in switching cars west in the neighborhood of Eighth and Seneca streets onto the main lead track. The cars were backed in on another of the three tracks, and again back on the main line several hundred feet west of the three-throw switch, where the train stopped; the engine being at the west end of the train. While it was stopped, the boy passed it. He continued along the track eastward past the switch, which was set on a different track from the one on which he was killed. After he passed the switch, the train backed east, and the switch was thrown to the track on which he was killed. Just before the train reached him, which was going at the rate of four miles per hour, he turned suddenly to cross the track on which the train was coming, was struck by the cars, and killed. No whistle was blown or bell rung by those in charge of the

avenue is a street 100 feet in width, and there are two street-railway tracks in the center of the street. The car in question had stopped previous to the accident for the purpose of letting off passengers at the south side of Belknap street. It then proceeded south for about 130 feet, at which point the accident happened. The time of the accident was about six o'clock P. M., and it was still daylight. It appears from the evidence that the boy Rex, with some other boys, was on the west sidewalk of Tower avenue, when one of the other boys threw three peanuts into the street, saying, 'Come on, kids; I'll throw out some peanuts.' One of the peanuts went only a few feet into the street, another went onto the street-railway tracks, and the third went nearly to the east side of the roadway of the street. Rex and two other boys started for the peanuts. One of the other boys got the nearest peanut, and Rex, seeing that he could not get that one, started for the second, and got it, and was about to go for the third one, when he was struck by the defendant's car, which he had not seen. He was carried along a little distance on the fender of the car, but rolled off the fender under the car, which passed over him, and inflicted injuries. The claim of the plaintiff is that the boy had been standing upon the track, eating the peanut, for some seconds, and that the motorman was guilty of negligence in not seeing him, and stopping the car, or giving warning. On the other hand, the claim of the defendant is that the boy darted immediately in front of the car, so that it could not be stopped, or any warning given. There was a general verdict for the plaintiff, assessing his damages at $1,160, of which $800 was compensation for future services. The jury also answered a special question which was submitted to them by the court to the effect that the boy was not guilty of any want of ordinary care which contributed to cause the accident. Upon a motion for a new trial the court held that the verdict of $800 for future services was excessive, and granted a new trial, unless the plaintiff remitted $500 from the verdict. This remission was made, and judgment entered for the balance of the verdict, and the defendant appeals." *Held*, that whether the child or its parents were negligent were questions for the jury; and that the motorman's failure to anticipate the sudden and unsuspected action of the boy in running in front of the car, could not be called negligence.

train. At the time he started to go across the track, the conductor, who was about a block away, shouted at him, but the warning came too late. He could have seen the cars backing up if he had looked. The court below sustained a demurrer to plaintiffs' evidence, which ruling has been brought here for review."

DAVID KELSO, N. E. VAN TUYL and JOHN T. O'KEEFE, for plaintiffs in error.

A. A. HURD, O. J. WOOD and W. LITTLEFIELD, for defendant in error.

SMITH, J. — The testimony introduced by the plaintiffs below showed that the deceased, up to the time he stepped on the track, was walking in a place of safety between what is called the "main line" and the track next to it. He was familiar with the location, and had traveled over the ground adjacent to these railroad tracks many times. He knew that the employees of the railway company were engaged in switching freight cars, and just before his death he had passed the very train which struck him a short distance west of the place where he was killed. This train, consisting of an engine and six or seven cars, was moving about with nothing to prevent its being seen by a person walking through the yard. Had the plaintiff's son taken the slightest precaution, by looking or listening, to ascertain whether the train which he had passed a few minutes before was backing up, he would have escaped the injuries which resulted in his death. He was in a place of safety up to the time of his suddenly stepping in front of the approaching cars. It appeared in the testimony that no warnings could have availed to prevent the injury after the boy stepped on the track. In Railroad Co. *v.* Holland, 60 Kan. 209, 56 Pac. Rep. 6, it is said: "A person who sees a railroad track upon which trains may pass at any time is already warned of danger, and it is the imperative duty of one about to cross the tracks of a railroad at least to look and listen for approaching trains. If he fails to look, when, by looking, he could see a coming train, and there is no excuse for such failure, he will be deemed guilty of negligence *per se*, and not entitled to recover for injuries sustained in a collision with a train, although those in charge of the train failed to give any signals of its approach." See also Railroad Co. *v.* Willey, 60 Kan. 819, 6 Am. Neg. Rep. 515, 58 Pac. Rep. 472; Beal *v.* Railway Co. (Kan.), 8 Am. Neg. Rep. 395, 62 Pac. Rep. 321. Counsel for plaintiffs in error contend that the question of the boy's contributory negligence should have been submitted to the jury, and ought not to have been determined by the court as a matter of law on a demurrer to the evidence. The testimony showed that the boy was bright and intelligent, strong, and in

good health, and that he was nearly sixteen years of age. lived in the neighborhood of these tracks about five years, observed the switching of cars back and forward in th Previous to the accident he had been working for wages in a and before that had clerked in a drug store. He attended s the winter and worked during the summer months. A p infant or not — is required to exercise only such capaci possesses. The caution required of an infant is measure maturity and capacity, and this is to be determined in each the circumstances of that case. Railroad Co. *v.* Gladmon, 401, 21 L. Ed. 114. Age is of no significance except as a capacity. Railroad Co. *v.* Young, 81 Ga. 397, 7 S. E. Rep. Am. St. Rep. 320; Thompson *v.* Railway Co., 145 N. Y. 19 E. Rep. 709. In this state a minor at fifteen years of a enter into a contract of marriage. Gen. St. 1899, § 2168. same age he may choose his own guardian. Both acts inv exercise of discretion. If the person killed had been an that is, over the age of twenty-one years — of sound mi possessed of all his faculties, there could be no room for do the railway company would not have been responsible. T trary test of age alone should not govern the court in its sub of the cause to the jury. If such rule be adopted, then, i case where contributory negligence is interposed to defeat for personal injuries, all consideration of the capacity, inte and responsibility of the person injured is withdrawn from th and submitted to the jury, where the person injured is under one years of age, notwithstanding he may have been close to of majority, and as capable in all respects as an adult, and s Shear. & R. Neg. (5th Ed.), § 73. In the case of Merry Railway Co., 85 Iowa, 634–638, 52 N. W. Rep 545, 546, a thirteen years and one month of age was injured while j on a turntable which had been set in motion by other boys. action to recover for the injury the plaintiff admitted that h the distance between the ends of the table and the emban that, if his leg was caught between them, it would be crushe if he had thought of the danger, he would have avoided it, b he did not think of it because he was having fun. The cou "There are numerous cases which hold that the question o gence on the part of minors is for the jury to determine, ar is the rule where the ability of the minor to comprehend th of his acts and the danger to which they will expose him is verted. But this case involves no question of that kind. attention to his surroundings would have shown the plain

danger. He fully understood what would happen to his leg if caught between the table and the embankment, and some care on his part would have been sufficient to avoid all danger. The fact that his attention was diverted by the play in which he was engaged did not excuse his failure to exercise at least the slight degree of care which was needed for his protection. The conclusion is irresistible that the proximate cause of the accident was a want of that attention and care on his part which his knowledge and judgment required him to exercise." Under the circumstances of this case it would have been an evasion of responsibility for the court to have submitted to the jury the question whether the minor was of sufficient age and intelligence to comprehend the results of his own negligence. A man of twenty-one, possessing no more knowledge of the world, no better educated, and no more active, mentally or physically, would have been charged, as a matter of law, with the consequences of such rashness or want of care; and no certain time of life, after the irresponsible age of tender childhood has passed, should be arbitrarily fixed to determine the limits of discretion or accountability for acts done or duties neglected. The legislative declaration that the period of minority extends in males to the age of twenty-one years was obviously not intended to make that age, when reached, a time when the rules of evidence become changed, or their force impaired, with respect to persons charged with contributory negligence who have lived a shorter time. It could be urged with much force that the statute which permits a male infant of the age of fifteen years to enter into and carry out a contract of marriage implies the possession of a high degree of discretion and judgment, and a manhood adequate to the responsibilities assumed. If the deceased in this case had been married — which he might lawfully have been — that fact would not have been a determining consideration in an inquiry whether he was able to look out for himself at the time he was beset with the dangers which caused his death. Neither can it be said that the fixing by statute of a year when majority is reached must be held decisive in all cases of the time when a person has arrived at a period of accountability for his negligent acts. Irrespective of laws which remove the minor's political disability at one age and confer a right to marry at another, courts must look at the capacity, natural and acquired, of him whose conduct is under scrutiny; and, if it clearly appears from the evidence that the child had a capacity for self-protection which it culpably omitted to use in face of a danger which it knew and sufficiently appreciated, then no question is left for the jury to pass on concerning the contributory negligence of the person charged with

it. The court ought not to be required to release its gras facts presented to a jury, nor be hampered in applying it gence to their probative force, in a case where it manifestly that negligence contributing to an injury which is the subje action proceeds from a person, though under age, who ha capabilities to make him apprehensive of threatened harm, at the same time is possessed with sufficient physical str avoid it. See Wallace *v.* Railroad, 165 Mass. 236, 42 N. 1125; Railway Co. *v.* Tartt, 12 C. C. A. 625, 64 Fed. R Felton *v.* Aubrey, 43 U. S. App. 278, 7 Am. Neg. Cas. 405, A. 436, 74 Fed. Rep. 350.

The case of Biggs *v.* Consolidated Barb-Wire Co., 60 Kai Am. Neg. Rep. 335, 56 Pac. Rep. 4, 44 L. R. A. 655, is counsel for plaintiffs in error as decisive of the question be While the general language used in the syllabus of that cas broad enough to cover the proposition involved here, yet t in the case at bar more sharply present the question of the contributory negligence, and differ in many material respec those on which the decision in the Biggs Case were based. latter case the death of the infant was caused by a set screw a to a revolving shaft, the velocity of which was so great tha said that "neither a boy of fourteen nor a man of matur could have seen it."

The judgment of the District Court will be affirmed. justices concurring.

HARI v. OHIO TOWNSHIP, SALINE COUN

Supreme Court, Kansas, December, 1900.

DEFECTIVE HIGHWAY — NOTICE OF DEFECTS — STATUTE five-days notice to township trustees of defects in public highways by Gen. St. 1899, c. 16, § 17, in order to charge the townships with occasioned by such defects, means actual notice, and not notice i from the notoriety or long continuance of the defects (1).

(Syllabus by the Court.)

1. For other actions relating to Defective Highways, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See Note, at end of this case, on NOTICE OF CLAIM FOR PERSONAL INJURIES AGAINST MUNICIPAL C TIONS.

See the following recent against municipal corporati which the question of statutor of defects is involved:

Defective highway — Injurec

ERROR from District Court, Saline County.

Action by Anna Hari against Ohio Township, Saline County. A demurrer to the petition was sustained, and plaintiff brings error. *Affirmed.*

DAVID RITCHIE, R. A. LOVITT and H. C. LONG, for plaintiff in error.

WILSON & WILSON and Z. C. MILLIKEN, for defendant in error.

DOSTER, Ch. J. — This was an action brought by Anna Hari against Ohio Township, Saline County, to recover damages for injuries sustained on account of a defective highway. The action was brought under Gen. St. 1899, c. 16, § 17, which allows a recovery against a township on account of defective highways, when the trustee of such township shall have had at least five days' notice of the existence of the defects prior to the time when the injury

driving — Notice of claim. — In BREEN *v.* TOWN OF CORNWALL *(Connecticut, November, 1900)*, 47 Atl. Rep. 322, an action for injuries caused by a defective highway, there were two questions presented on the appeal, as follows (*per* HALL, J.): "First, whether the notice contains a sufficient description of the cause of the injury sustained by the plaintiff; and, second, if it does, whether it describes the same cause of the injury as that alleged in the complaint.

"The act of 1895 amending section 2673 of the General Statutes requires, as a condition to the maintenance of such an action, that the plaintiff shall give to the defendant 'a written notice of such injury and a general description of the same, and the cause thereof, and of the time and place of its occurrence. * * *' 'The sufficiency of the notice is to be tested with reference to the purpose for which it is required. If sufficient for that purpose, it is a good notice.' Budd *v.* Railroad Co., 69 Conn. 272–285, 3 Am. Neg. Rep. 335, 37 Atl. Rep. 683. The place, cause, and nature of the injury are sufficiently stated in the notice when they are 'truly described with such a reasonable degree of certainty that ordinary men, in the exercise of ordinary intelligence, under the circumstances, can learn from the notice the nature of the injury, and be able to ascertain by the use of ordinary diligence the place where it occurred, and the cause that occasioned it.' Gardner *v.* City of New London, 63 Conn. 267–272, 28 Atl. Rep. 42; Budd *v.* Railroad Co., *supra;* Dean *v.* Town of Sharon, 72 Conn. 667–674, 7 Am. Neg. Rep. 706, 45 Atl. Rep. 963; Lilly *v.* Town of Woodstock, 59 Conn. 219, 22 Atl. Rep. 40. * * *" "The notice before us describes the place where the injury occurred as 'on that ledge of rocks in the road,' 'near the ruin of an old house,' on a road the name of which is given, and between a turnpike and a house the names of which are given. It states that they were nearly thrown out before they 'came to those rocks,' and so were driving carefully when the accident occurred. This statement, with what precedes it, renders it sufficiently clear that the accident which caused the plaintiff to be thrown from her carriage happened when they came to those rocks, the particular location of which had been already described. Without repeating here all of the language of the notice descriptive of the cause of the injury, but reading it as we think ordinarily intelligent persons would

occurred. A demurrer to the petition was sustained, and order sustaining it error has been prosecuted to this cou claim of error relates entirely to the construction of the sta cerning notice to the township trustee. Does the statut actual notice to him, or is that notice which may be impl the visible character and long-continued existence of th sufficient? The plaintiff's petition disavowed all claim c notice to the trustee, and only charged against him th which may be presumed from the open character and c existence of the defect. In our judgment, such last-mentio of notice is insufficient. The statute requires "at least fi notice," and that, we think, means actual notice. It is n statute requires, and not the inference of notice. Notice is knowledge of that fact. Constructive notice does n

understand it, the notice states that the plaintiff and her friend, while driving along the Cook road, between the Warren turnpike and Richard Brophy's house, drove upon a ledge of rocks in the highway near the ruins of an old house, and thereby their wagon was broken, and the plaintiff was thrown out upon the ledge of rocks and very much injured. This is a sufficient statement of the cause of the injury to meet the requirements of the statute. It is not only a statement that the cause of her injury was being thrown upon a certain ledge of rocks in the highway, but a sufficiently clear statement that the cause of her being thrown from the wagon was the driving upon these rocks, and the breaking of the wagon." * * * "A general description of the cause of the injury in the notice, which is not in itself a part of the pleading, does not prevent the plaintiff from alleging such cause more specifically in the complaint, nor from proving at the trial the particular facts so alleged. Budd *v.* Railroad Co., *supra.*" The court erred in sustaining the defendant's demurrer to the complaint. Error, and judgment reversed, and the case remanded to be proceeded with according to law. The other judges concurred.

Steam engine on street — Ho ened — Notice of defect. — In CITY OF LEWISTON *(Mai 1900)*, 47 Atl. Rep. 548, the points decided are sufficiently the syllabus by the court a "(1) The jury gave a verdi plaintiff upon these facts: T tiff, a man eighty-two years o sight was somewhat defec driving upon one of the stre defendant city, when his hors frightened by the noise of ste ing from a portable steam engi ing within the limits of the st used in hoisting materials for tion of a building; and, by his horse being so frightened, tiff was thrown from his car received personal injuries.

"Upon motion for new tri fendant contended that, in vi plaintiff's age and defective was negligence for him to dri a public street. It did not ap the plaintiff's infirmities of ag contributed to his injuries. *E* the motion cannot be sustaine reason.

"(2) The presiding justice i the jury that, in determining the plaintiff was in the ex ordinary care, they should

knowledge, but is entirely a presumption of law. The requirement of notice for "at least five days" implies that actual notice is meant. If it did not, the statute would have to be interpreted as though it read "the existence of defects for such length of time, not less than five days, sufficient in character and in general notoriety as to raise a presumption of knowledge." The statute cannot be so construed. The road overseers of a township are primarily and specially charged with the repair of the public highways. The township trustee is not charged with that duty, except under the provisions of Gen. St. 1899, c. 110, sec. 25c. That section reads: "The township trustee may remove obstructions from the highways in cases where the road overseers shall refuse or fail to do so; and the trustee shall, in such cases, have all the power of road overseers in calling out the inhabitants to perform the work necessary to

the circumstances, and that the condition of the plaintiff must be considered, and that he must use the degree of care for a man in his condition, — such a degree of care as men who are near-sighted, as he was, being ordinarily prudent, would use under the same circumstances. *Held*, that the instruction was correct.

"(3) To prove that the defendant city had twenty-four hours' notice of the defect, which caused the plaintiff's injury, the plaintiff relied upon an admission that an alderman of the city had at least twenty-four hours' notice that the steam engine and boiler were in the street, and apparently used in hoisting material into the building.

"*Held*, that the jury was justified in finding that the city had actual notice that the engine was in the street for the purpose of being operated, and that such notice included the common knowledge that such an engine, in its ordinary and proper operations, would emit steam, thereby producing noise, and that therefore it had actual notice of the defect which caused the plaintiff's injuries."

Defective sidewalk — Notice of Claim. — In TERRILL *v.* CITY OF FARIBAULT *(Minnesota, December, 1900)*, 84 N. W. Rep. 458, the syllabus by the court states the case as follows: "This is an action for damages caused by a defective sidewalk. It appears from the allegations of the complaint that the plaintiff signed the notice and statement of her claim with the initials of her husband's name, instead of her own. *Held*, that the notice was *prima facie* sufficient." Order granting new trial (action having been dismissed) affirmed.

Defective highway—Notice.—In GARDNER *v.* WASCO COUNTY *(Oregon, November, 1900)*, 62 Pac. Rep. 753, an action for injuries sustained on a defective highway, a petition for rehearing on the ground that the court in its former decision (61 Pac. Rep. 834) misconstrued the statute rendering the county liable for injuries sustained on defective highways. The court, in its opinion (*per* WOLVERTON, J.), said: "We were, perhaps, too brief in our former discussion to be well understood. The statute provides that 'whenever any individual, while lawfully traveling' upon a highway of this state, the same being a legal county road, shall, without contributory negligence on his part, and not having been warned of the defect or danger by notice or otherwise, sustain any loss, damage, or injury, * * * he shall be entitled to recover

remove such obstructions." This section necessarily implie knowledge upon the part of the trustee. Only under it specific duties in relation to the repair of highways impos the trustees. There are other statutory provisions quite ge terms, and some of them vague in meaning, which charge ship trustee with the oversight and supervision of the road o in the performance of their duty; but in general, and as just it may be said that the trustee is nowhere, except in the i mentioned, specially charged with the observation of the cc of the highways, or the repair of defects existing in them. we do not see how we can read into the statute words wh give it the interpretation contended for by the plaintiff ir

compensatory damages,' etc. Sess. Laws 1893, p. 141. This has given a remedy where none formerly existed, but the general rules of the law touching the negligence of the county and contributory negligence of the complainant are applicable, as in similar actions of negligence against individuals or private corporations. The clause, 'not having been warned of the defect or danger by notice or otherwise,' has reference, and was intended, no doubt, to give effect to the custom of the counties in giving notice of the bad condition of roads and bridges within their supervision where found to be so defective as to be dangerous and unsafe for public use or travel. The public safety and welfare require that they take such precaution to prevent injury, being charged with the duty of keeping the highways in suitable condition and repair. The warning may be given otherwise than by notice, which, by common understanding, is written or printed. It may be by obstructions or barriers intended as signals of danger and to divert travel. 'If the way becomes dangerous or impassable,' says Mr. Elliott, 'it must be protected; and fences, barriers, or other means must be u ed to warn travelers of the danger.' Elliott, Roads & S. 458. So it was held in Erie City *v.* Schwingle, 22 Pa. St. 384, in effect, that, if the officers of the borough permitted the be used, without warning the its imperfect condition, the charge the plaintiff with ine negligence or want of ordinar using it. These references su illustrate our meaning withou comment. Now, a person no been so warned has his acti knowledge is not the equiv such warning, and was not so i by the legislature. Of course edge of a defect, and the us road or bridge with such know evidence of negligence; but, i shown commensurate with the still the action will lie. The by the county relieves it from for, if persons essay to ventu the road or highway thereaf before proper repairs are ma do so at their own risk. It wo been an easy matter for the le to have used the expression ' knowledge,' instead of, or in to, the words 'not having been etc.; and we must assume that tended knowledge of the defe the equivalent of the warning to, it would have said so quite and directly. But, having other expression, we think it sl interpreted as we have indicate The petition for rehearing wil nied."

We do not regard any of the remarks of the courts in this State, quoted in the briefs of counsel, as bearing upon the precise question. We have searched elsewhere than among our own decisions to find authority. The case of Freeholders *v.* Hough, 55 N. J. Law, 628, 28 Atl. Rep. 86, is more nearly in support of the plaintiff's contention than any others. In that case the court construed an act which required reasonable notice to an officer of defects in a highway to mean notice inferable from their notoriety and long continuance. It may be that "reasonable notice" of a defect in a highway means notice presumable from its open exposure and its long existence, but, whether that be true or not, we cannot regard the case mentioned as one to influence our judgment. Cases of constructive notice to the governing authorities of cities of defects in streets and sidewalks shed no light upon the question. Municipal corporations are under a common-law obligation to respond in damages for injuries occasioned by such defects, and they are, therefore, chargeable with what the common law esteems as notice. Quasi corporations, such as townships, are liable only as made so by statute, and therefore the statutory kind of notice must be given.

The judgment of the court below is sustained. All the justices concurring.

NOTICE OF CLAIM FOR PERSONAL INJURIES AGAINST MUNICIPAL CORPORATIONS.

A notice of claim against municipal corporations for personal injuries sustained on defective highways is distinct from a notice of defect to such corporations.

Notice preliminary to action.

Notice of injury is required, in many of the States, to be given to the city or some specified officer before an action can be maintained by the injured party. Provisions of this nature are found in many city charters and in statutes of some of the States. They are usually regarded as conditions precedent, performance of which must be alleged and proved. See Elliott on Roads and Streets, sec. 642; Tiedeman on Munic. Corp., sec. 350b.; Shearm. & Redf. on Neg. (5th ed.), sec. 373

See Marshall Co. *v.* Jackson Co., 36 Ala. 613; City of Denver *v.* Saulcey, 5 Colo. App. 420; Pardey *v.* Mechanicsville, 101 Iowa, 266; Kennedy *v.* Des Moines, 84 Iowa, 187; Angell *v.* City of West Bay City, 117 Mich. 685; Jones *v.* Minneapolis, 31 Minn. 230; Minick *v.* City of Troy, 83 N. Y. 514; Reining *v.* City of Buffalo, 102 N. Y. 308; Benware *v.* Pine Valley, 53 Wis. 527; Foley *v.* New York, 1 App. Div. (N. Y.) 586, 37 N. Y. Supp. 465.

Time limit — Condition precedent.

Notice must also be given within a certain time after the injury was received, and is also regarded as a condition precedent and one that, in some States, cannot be waived. Ib.

See Canfield *v.* City of Jackson, 112 Mich. 120; Wright *v.* Village c (Mich.), 76 N. W. Rep. 141; Maddox *v.* Randolph Co., 65 Ga. 216; Rockland, 68 Me. 511; Gay *v.* City of Cambridge, 128 Mass. 387; I Guilford, 47 Vt. 519; Dorsey *v.* Racine, 60 Wis. 292; Haines *v.* Le Me. 18; Starling *v.* Bedford, 94 Iowa, 194.

Damages claimed.

The notice should also state that damages are claimed for the inj variance between the amount claimed in the complaint and that in is not material. Ib.

See Minick *v.* Troy, 83 N. Y. 514; Reed *v.* N. Y., 97 N. Y. 620; Wy White, 13 Kan. 191.

Variance.

But any material variance, particularly as to the manner or time of will invalidate the notice. Ib.

Shaw *v.* Waterbury, 46 Conn. 263; McDougall *v.* Boston, 134 M Spooner *v.* Freetown, 139 Mass. 235; Beisiegel *v.* Seymour, 58 Conn. ley *v.* Danbury, 64 Conn. 381; Rogers *v.* Shirley, 74 Me. 144; Willar burne, 59 Vt. 361.

Requisites of notice.

As to the requisites of notice, see City of Denver *v.* Saulcey, 5 C 420; Shaw *v.* Waterbury, 46 Conn. 263; Cloughessey *v.* Waterbury, 51 C Owen *v.* City of Fort Dodge, 98 Iowa, 281; Wyandotte *v.* White, 191; Hutchings *v.* Inhab. of Sullivan, 90 Me. 131; Rogers *v.* Sl Me. 144; Kaherl *v.* Inhab. of Rockport, 87 Me. 527; Lord *v.* City 87 Me. 231; Chapman *v.* Nobleboro, 76 Me. 427; Sargent *v.* Lynn, 138 I Prendergast *v.* Clinton, 147 Mass. 402; McCabe *v.* Cambridge, 134 M Liffin *v.* Beverley, 145 Mass. 549; Kenady *v.* Lawrence, 128 Mass. 318 gall *v.* Boston, 134 Mass. 149: Spooner *v.* Freetown, 139 Mass. 235; W *v.* Waltham, 144 Mass. 184; City of Lincoln *v.* O'Brien, 56 Neb. 761; Troy, 83 N. Y. 514; Reed *v.* New York, 97 N. Y. 620; Missano *v.* Ci York, 17 App. Div. (N. Y.) 536, 45 N. Y. Supp. 592, 3 Am. Neg. reversed in 160 N. Y. 123, 6 Am. Neg. Rep. 652; Seamons *v.* Fitts Atl. Rep. 863; McKenna *v.* Bates, 19 R. I. 610; Whalen *v.* Bates, 19 City of Ft. Worth *v.* Shero, 16 Tex. Civ. App. 487; Fassett *v.* Roxbu 552; Benson *v.* Madison, 101 Wis. 312; Hiner *v.* Fond du Lac, 71 Wis.

Illustrations — Time limit — Evidence.

In Saunders *v.* City of Boston (Mass. 1897), 1 Am. Neg. Rep. 448, it that a woman who sprained her ankle on a defective sidewalk and w to walk for several weeks is not excused from giving the ten da required by Pub. St., c. 52, sec. 19, as amended by St. 1894, by reason or physical incapacity within section 21, where it appeared that she w tell her husband of the accident on the night of its occurrence, and t on his first visit to her.

But in Barclay *v.* City of Boston (Mass. 1897), 1 Am. Neg. Rep. 449, appeared that a woman fell on the street and was so severely injured had to be taken to a hospital and that eleven days passed before h could learn where she was, and that then she was suffering great

much of the time was delirious, and that before the accident she was living on terms of affection with her family, warrants the inference that all the time she was in the hospital she was physically and mentally incapacitated from directing such business as causing notice of her accident to be sent to the city within ten days, as required by Pub. St., c. 52, sec. 21, to save a claim for damages.

In Bausher *v.* City of St. Paul (Minn. 1898), 4 Am. Neg. Rep. 407, it was held that Laws 1897, c. 248, requiring notice to cities and villages of the injury for which damages are claimed, is mandatory, and is a condition precedent to a right to maintain an action for such damages; and, unless the notice served states the amount of compensation claimed for the injury, no action can be maintained against the city therefor.

In Hildman *v.* City of Phillips (Wisconsin, 1900), 7 Am. Neg. Rep. 705, where plaintiff was injured on October 8, and alleged that he served notice on the city within ninety days of the happening of the injury, and his evidence was to the effect that he had been sick at home for three or four months before he went out at all, that he sent a person to serve the notice but did not exactly know when he served the notice, it was held that on such evidence it could not be said, as matter of law, that the notice was served within ninety days of the time of the accident, as required under Rev. St., sec. 1339, and hence the special verdict for plaintiff was defective, as it did not determine all the material facts in issue.

See also Dean *v.* Town of Sharon (Conn. 1900), 7 Am. Neg. Rep. 706; Giles *v.* City of Shenandoah (Iowa, 1900), 7 Am. Neg. Rep. 707; Gagan *v.* City of Janesville (Wisconsin, 1900), 7 Am. Neg. Rep. 706, on the question of statutory notice to city in cases of personal injury sustained by defective highways.

Illustrations — Variance.

In Marcotte *v.* City of Lewiston, (Maine, 1900), 8 Am. Neg. Rep. 438, an action brought to recover damages for an injury to plaintiff's horse, caused by an alleged defect in a highway in a city, the plaintiff gave written statute notice of it to the municipal officers of the city, within fourteen days after the accident, in which it was stated to have occurred on February 12, and the declaration alleged the same date. At the trial plaintiff offered evidence tending to show that the accident occurred on February 13 instead of February 12, but such evidence was excluded and plaintiff excepted. *Held*, that the evidence should have been admitted. *Held*, also, that the notice having been given within fourteen days after the injury, as required by statute, the mistake in the date of the accident did not vitiate the notice and render it inoperative.

In Frost *v.* City of Casselton (North Dakota, 1899), 6 Am. Neg. Rep. 653, it was error to submit question of sufficiency of notice of injury to jury, as that was a question of law. Section 2172, Rev. Code, declares that all claims against cities for injuries received by reason of defective sidewalks, etc., shall within sixty days thereafter be presented to the mayor and council, duly verified, "describing the time, place, cause and extent of the damage or injury." Other sections declare that no action can be maintained on account of such injury unless such notice has been given. Plaintiff presented the notice in time, but at the trial her evidence placed the defect and injury 100 feet distant from the place designated in the notice. Plaintiff, by leave, amended her complaint to conform to proof, and defendant moved for dismissal for insufficient notice. *Held*, that sufficiency of notice was question of law for the court and, as matter

of law, such notice was insufficient to sustain amended complaint. tions of the statute above mentioned are mandatory, and make the tion of a proper notice a condition precedent to any recovery.

Illustration — Damages claimed.

In Morgan *v.* City of Lewiston (Maine, 1898), 4 Am. Neg. Rep. held that the statute requiring persons injured by reason of a defecti give notice and to "set forth his claim for damages" does not mea damages must be specified or that the amount claimed must be state

Illustrations — Requisites of service — Evidence.

In White *v.* Mayor, etc., 15 App. Div. (N. Y.) 410, 2 Am. Neg. R N. Y. Supp. 454, it was held that a complaint alleging injury to the plaintiff's wife and children from negligence of defendant in perr accumulation of surface water which became stagnant, alleges a perso and is within Laws 1886, c. 572, prescribing that no such action can tained unless notice of an intention to sue has been filed with the c counsel.

In Canfield *v.* City of Jackson (Mich. 1897), 1 Am. Neg. Rep. 626, i that unless the defense that the plaintiff's claim for injuries was not to the city council, as the charter prescribed, is presented at the waived.

In Missano *v.* Mayor, etc., 17 App. Div. (N. Y.) 536, 3 Am. Neg. R was held that service upon the comptroller of the city of New York, ur 1882, c. 410, sec. 1104, requiring notice of intent to sue the city to be se not satisfy Laws 1886, c. 572, sec. 1, requiring such a notice to be filec corporation counsel, though the comptroller sent the notice to the of corporation counsel.

But the Court of Appeals reversed this ruling (160 N. Y. 123, 6 Rep. 652), that court holding that a notice purporting to be given in cc with sec. 1104 of the Consolidation Act, which has no reference to tl of a notice of an intention to sue, is not thereby invalidated when under which Laws 1886, c. 572, sec. 1, was required to be filed with th tion counsel, was addressed to and served on the city comptroller, w to the corporation counsel, who filed it in his office and acted on it by e the plaintiffs upon the notice to them to appear. Missano *v.* Mayor, Y., 160 N. Y. 123, 6 Am. Neg. Rep. 652.

In Sheehy *v.* City of New York, 160 N. Y. 139, 6 Am. Neg. Rep. 6 held that Laws 1886, c. 572, was substantially complied with where contained no express statement of an intention to sue, but it was entit matter of the claim of the plaintiff against the city and declared that tiff claimed and demanded from the city damages for personal inj tained by falling upon a sidewalk that was alleged to be defective notice was signed by the plaintiff and her attorneys, who gave their address.

In Place *v.* City of Yonkers, 43 App. Div. (N. Y.) 380, 6 Am. Neg. 60 N. Y. Supp. 171, under the charter of the city as revised by Laws 18 tit. 12, sec. 6, requiring before an action against the city is begun o for a personal injury a notice describing the extent of the injury shall it was held that a notice that a claim was for "severe and permanent

my head and body of $5,000," was sufficient where the injury was to the claimant's eye. It was also held that a requirement that the notice should be verified was sufficiently complied with where the notary's certificate stated that the party had been sworn, though the notice was unsigned but began with the party's name.

In Seamons *v.* Fitts, Town Treasurer (R. I. 1899), 42 Atl. Rep. 863, an action for damages for personal injuries caused by horse sinking into defect in highway, and throwing occupants of wagon to the ground, it was held that service of notice of claim upon the town treasurer was not a compliance with the act requiring the same to be presented to the town council. But service upon the town clerk constituted a legal service under the statute.

In Sproul *v.* City of Seattle (Washington, 1897), 3 Am. Neg. Rep. 300, where plaintiff's attorney's clerk testified, without objection, that he served a claim for personal injuries sustained by falling on a defective sidewalk, within the statutory period, such evidence was sufficient proof of service of claim upon the city.

In Harris *v.* City of Fond du Lac (Wisconsin, 1899), 6 Am. Neg. Rep. 653, it was held that the charter of the city, Laws 1899, c. 435, that required notice of personal injuries from defective highways to be given to the city within thirty days of the time the party injured had been restored to consciousness governed in actions brought against the city for such injuries, and not Rev. St. 1878, sec. 1339, as amended by Laws 1897, c. 236, providing that no action should be maintained against any city for such injuries unless notice was given within fifteen days. It was also held that under the charter requiring notice of any injury caused by a defective sidewalk to be served upon the street commissioner or sidewalk superintendent or alderman of the ward where the injury occurred a service of such notice upon the mayor and city clerk was not sufficient.

For other actions involving the question of notice of claim for injuries to municipal corporations, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

BERRY v. ROSS ET AL.

Supreme Judicial Court, Maine, June, 1900.

TOWBOAT — COLLISION BETWEEN VESSELS — PERSONAL INJURIES — NEW TRIAL. — 1. The owners of towboats are not common carriers nor insurers. Those who have the management of such boats are required to exercise reasonable care and caution and maritime skill. The tug is the dominant mind and will of the adventure. The master of the tow has no voice or volition in the construction of the tow or in its management.

2. It is the duty of the master of the tug to see that the tow is properly constructed, and that the lines are sufficient in quality and in length, and securely fastened.

3. While employed in the waters of the home port of the tug, her officers are bound to know the channel, the shoals, the currents, and the state of the tides, and all risks and dangers incident to the employment, and whether,

in the state of the wind and water, it is safe and proper to come i
tow (1).

4. A new trial will not be granted to permit the introduction of c
testimony newly discovered.

(Official.)

ACTION by Burdick Berry against Walter Ross and
Verdict for plaintiff. Motion by defendants for a ne
Overruled.

On motion by defendants.

"Action on the case for personal injuries sustained by the
master of the schooner Ludwig Bill, by reason of the negli
the captain of the defendants' steam tug Ralph Ross in to
plaintiff's vessel on the 4th day of September, 1897, from F
to Bangor.

"Plea, general issue, and the following brief statement by
special defense: That as a part of the contract of towage
into between the parties as set out in the plaintiff's writ and
tion it was understood and agreed between the parties that t
wig Bill should be towed astern of the Augustin Palmer b
attached to the Palmer; that there was some probability t
Augustin Palmer might ground, and, if the Palmer should
that the Ludwig Bill should sheer off, and avoid a collision
Palmer; that the plaintiff was fully advised as to how his
would be towed, of the risk of the Palmer grounding, of the n
of keeping off his vessel, the Ludwig Bill, and avoiding a c
between the two vessels, and assumed the risks.

"The jury returned a verdict for $3,539 for the plaintiff."

Argued before WISWELL, CH. J. and EMERY, HASKELL, S
SAVAGE, and FOGLER, JJ.

C. E. & A. S. LITTLEFIELD and O. F. FELLOWS, for plaintiff

C. F. WOODWARD, for defendants.

FOGLER, J. — This is an action on the case, in which the p
sues to recover damages for personal injuries sustained
through the alleged negligence of the defendants' agent and s
the master of their steam tug Ralph Ross.

The plaintiff was the master and owner of the schooner I
Bill, of the burden of about fifty-nine tons. In the foren
September 4, 1897, the Bill was lying at Ft. Point Cove, ne
mouth of Penobscot river, the plaintiff being on board as n
bound for Bangor, light. The defendants' tug engaged wi

1. For other actions arising out of Injuries Sustained in Collisions Between Vessels, from 1897 to date, see vols. 1–9 AM. NEG. REP., and
rent numbers of that series of R

plaintiff to tow his schooner up the river to Bangor; and also engaged to tow to Bangor the large four-masted schooner Augustin Palmer, coal laden, and drawing twenty and one-half feet forward and twenty-one and one-half feet aft. About noon of that day the tug came alongside the Bill, and took a line belonging to that schooner. The plaintiff testifies that the line was eighty fathoms in length and that he so informed Capt. Bennett of the tug. Capt. Bennett testifies that, as he remembers, the plaintiff told him the line was sixty fathoms in length, but he is not positive upon that point. The men on board the Bill paid out the line until orders came from the tug to "belay," when the line on board the Bill was made fast to her port windlass bitts. The captain of the tug testifies that he did not give the order to belay until he was informed by those on board the Bill that the line was nearly run out. This was denied by the plaintiff and the men of his crew. The length of line paid out was estimated by the plaintiff and his witnesses as from thirty-five to forty fathoms, while Capt. Bennett and other witnesses for the defendants estimated the length to have been forty-five or fifty fathoms. The captain of the tug testifies that, before he started with the Bill in tow, he told the plaintiff that he should tow him astern of the Palmer, and that the plaintiff must keep a good lookout, as the Palmer was likely to take bottom going up the river. The plaintiff denies that Capt. Bennett made such statement to him. Each is corroborated to some extent by their witnesses. The tug, with the Bill in tow, proceeded to where the Palmer lay. The end of the towline upon the tug was then transferred to the Palmer, and was made fast to the Palmer's starboard quarter. The tug, with her tow, then proceeded up the river at the rate of six or seven miles per hour. In the vicinity of Indian Point, a mile or so above Bucksport, there was a shoal in the river. There was testimony on the part of the plaintiff tending to show that at that point there was a current which ran diagonally across the river from the easterly to the westerly side. This was denied by the defendants, but it was admitted that the tide would hug the vessel towards the westerly shore. The captain of the tug testified that there was a log in the steamboat wharf at Bucksport which would indicate to him the depth of water upon the shoal; that, if he could see the log, he would know that there was not twenty-one and one-half feet of water over the shoal; that, if he could not see the log, it would indicate that there was that depth of water over the shoal. He testifies that as he, with his tow, passed the steamboat wharf, he could see the log, and therefore knew that there was not twenty-one

and one-half feet of water over the shoal. The tide was tl
ning up at about half flood. Capt. Bennett testifies that shor
leaving Bucksport he hailed the Bill, through the captair
Palmer, to the effect that the Palmer would take ground, a
the plaintiff must keep well outside of her to avoid a collisi
that shortly before reaching the shoal he repeated the orde
Bill in the same way. In this he is corroborated by Capt. I
master of the Palmer. The plaintiff testifies that he receiv
one such order, and immediately upon receiving it he put h
hard down as far as possible, and kept it so as long as he re
at the wheel. The Palmer grounded upon the shoal and s
The Bill forged ahead by reason of the momentum which i
acquired. The line by which she was attached to the Palmer
slack, and in the water. Neither the captain of the tug
captain of the Palmer testified that the plaintiff did not put h
hard down, but both testified that the Bill did not obey her
she ought to have done if her helm was in that position.
Bill approached the Palmer, her bow was outside of the Paln
her stern drifted in towards the Palmer's starboard quarter.
his vessel was near the Palmer, so that a collision seemed
ble, the plaintiff left his helm, seized a cork fender, and we
the narrow space, a foot and a half or two feet wide betw
cabin and his port rail, for the purpose of lowering the
between his vessel and the Palmer for the purpose of break
force of the collision. The plaintiff does not remember whe
succeeded in so placing the fender, but while he was in that p
the port quarter of his vessel struck the starboard quarter
Palmer, by which his port rail and several stanchions were c
in, and the plaintiff was caught between his rail and his ca
reason of which one of his legs was so crushed that amputati
necessary, and the bones of the other leg were broken in two
The plaintiff contends that such injuries were received throu
negligence and want of ordinary care of the master of the
several particulars, the principal of which are: First. That t
by which the Bill was attached to the Palmer was of insu
length considering the nature of the channel and the risks li
be encountered; that the line should have been seventy fath
length, and that, if the line had been of sufficient length, he
have been further from the Palmer when the latter grounde
could undoubtedly have avoided the collision. Secondly. T
was negligence to attach the line on his vessel to the por
forward and to the starboard quarter of the Palmer; that, if tl
had been attached to the same side of each vessel, he woul

been better enabled to keep outside the Palmer. And, thirdly, that it was gross negligence upon the part of the captain of the tug, when he saw the state of the water by his log in the steamboat wharf to proceed with his tow, knowing that the Palmer would inevitably ground upon the shoal, and that he should have waited until the state of the tide was such that there would be sufficient depth of water on the shoal for the Palmer to pass.

In answer to this contention of the plaintiff the defendants answer that the line by which the Bill was attached to the Palmer belonged on board the Bill, and that the plaintiff made no objection to the length of the line put out, nor to the manner in which she was attached to the Palmer; and that, the captain of the tug having informed the plaintiff that the Palmer was likely to ground, and he must look out, the plaintiff thereby assumed the risk of the Palmer's grounding, and of all the consequences incident thereto; that the plaintiff was guilty of contributory negligence in not keeping his schooner outside of the Palmer, especially when so ordered by the captain of the tug; and that the plaintiff was guilty of further contributory negligence by placing himself voluntarily in a position where he would be likely to be injured if the vessels collided.

The owners of towboats are not common carriers, nor are they insurers, and the law of those relations has no application here. The highest possible degree of skill and care is not required of them. Those who have the management of such boats are bound to bring to the performance of the duty which they assume responsible skill and care, and to exercise them in everything relating to the work until it is accomplished. They are required to exercise reasonable care and caution and maritime skill, and, if these are neglected, and disaster comes, the towboat must be visited with the consequences. The tug is the dominant mind and will in the adventure. The master of the tow has no voice or volition in the construction of the tow or in its management. It is the duty of the master of the tug, as the captains of the tow have no voice in making up the tow, to see that it is properly constructed, and that the lines are sufficient in quality and length, and securely fastened. This is his duty whether the tug furnished the line to the tow or the tow to the tug. In the nature of the employment, the officers of the tug can tell better than the man in the tow what sort of a line is required to secure the vessels in tow, and to keep them in position. While employed in the waters of the home port of the tug, her officers are bound to know the channel, the shoals, the currents, and the state of the tide, and all risks and dangers incident to the employment, and whether in the state of the wind and water it is safe and proper

to make the attempt to come in with her tow. If it is
should advise waiting for a more favorable condition of thing
Margaret, 94 U. S. 494, 24 L. Ed. 146; The Syracuse, 12 W
20 L. Ed. 382; The Quickstep, 9 Wall. 665, 19 L. Ed. 7
James Gray *v.* The John Fraser, 21 How. 184, 16 L. I
Sproul *v.* Hemingway, 14 Pick. 6.

Applying these principles of law to the testimony in this
cannot say that the verdict of the jury was manifestly wron
result of bias, prejudice, or mistake. As no exceptions to
ings or instructions of the presiding justice are taken,
assume that the case was submitted to the jury under
instructions. The testimony in several particulars is cor
The jury saw and heard the witnesses, and decided the c
their finding must stand.

The defendants contend strenuously that the plaintiff, in
his wheel and placing himself in the narrow space between
and the rail of his vessel, was guilty of contributory neg
This must be considered in the light of the circumstan
exigencies of the case. When he left his wheel, the two
were but a short distance apart. Capt. Haskell, of the
testifies that the distance was about fifty feet. While the
the plaintiff's vessel was outside the Palmer, his stern w
drawn by the current or tide towards the Palmer's starboard
It is not probable that a collision could have been averted b
of the rudder. Although, as the jury found, the plaintiff wa
in this dangerous position through the negligence of the m
the tug, it was still his duty to do everything that he re
could to save the two vessels from injury. Had he fail
this, he would have been guilty of negligence, and respon
the consequences. He had no time for calm deliberation,
act, if he acted at all, at once. Seemingly the only thing
do was to place a fender between the two vessels, and
diminish the force of the collision. The use of a fender,
ticable, is usual in case of an impending collision between
This the plaintiff, in the emergency in which he was placed
took to do. Was his action justified under the circumstance
jury answered that question in the affirmative, and we do
justified in reversing their decision.

We do not think the motion of the defendants for a new
reason of newly-discovered testimony can be sustained. T
mony upon which the defendants rely in this respect is
Joseph H. Gilley and his wife, Lydia J. Gilley, to whose h
plaintiff was immediately taken after the accident, where he r

until he was able to be removed, some four months afterwards. The fact that the plaintiff was at the house of these witnesses was known to the defendants, as one of them visited him there. We think by the exercise of due diligence the defendants might have discovered the testimony of these witnesses before the trial.

It is well settled that a party will not be granted a new trial on account of newly discovered testimony when such testimony was known to him, or by the use of due diligence might have become known to him.

"A new trial, to permit newly discovered evidence to be introduced should only be granted when such testimony is not cumulative, and when there is reason to believe that the verdict would have been different if it had been before the jury." Handley *v.* Call, 30 Me. 19; Ham *v.* Ham, 39 Me. 263.

Cumulative evidence is additional evidence of the same kind, to the same point. Glidden *v.* Dunlap, 28 Me. 379; McLaughlin *v.* Doane, 56 Me. 290; Parker *v.* Hardy, 24 Pick. 246.

The testimony of Mr. and Mrs. Gilley, which the defendants claim was newly discovered, was to the effect that the plaintiff, while at their house, made certain statements or admissions, which it is claimed were inconsistent with his right to recover in this suit. This testimony was cumulative, as testimony of the same kind and to the same point was introduced at the trial by the defendants. The testimony of these witnesses, upon which the defendants especially rely, is that the plaintiff said in their presence that he did not consider Capt. Bennett to blame in the least; that he had no one to blame but himself for the accident. Whether the captain of the tug was in fault, and whether the plaintiff was to blame, is not dependent upon any opinion of either of those parties, but is to be determined by the facts proved.

Motions overruled.

RILEY v. HARRIS.

Supreme Judicial Court, Massachusetts, November, 1900.

PERSON VISITING DEFENDANT'S SERVANTS ATTACKED BY DOG — TRESPASSER — STATUTE — DAMAGES. — Where plaintiff at the invitation of a friend who was a friend of defendant's servants went with her to call upon them and while approaching the back door of defendant's house by a back way defendant's dog rushed out and bit the plaintiff: *Held* in an action of tort under the statute that plaintiff was not a trespasser so as to

preclude recovery under Pub. St., c. 102, sec. 93, imposing a dou in any case where at common law an owner of a dog knowing th the animal injuring a person would be liable (1).

EXCEPTIONS from Superior Court, Suffolk County.

Action by Julia A. Riley against George R. Harris. 7 gave certain instructions, on account of which defendan *Exceptions overruled.*

E. O. ACHORN, for plaintiff.

A. M. LYMAN, for defendant.

HOLMES, Ch. J. — This is an action of tort brought un St., c. 102, sec. 93, to recover double the amount of dam tained by the plaintiff from a bite of the defendant's d

1. For actions relating to Persons Injured by Dogs and other Animals, from the earliest period to 1895, see vol. 1 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic, appear in vols. 1–9 Am. Neg. Rep., and the current numbers of that series of REPORTS.

In CHAPIN *v.* FYE *(United States Supreme Court, November, 1900)*, 21 Sup. Ct. Rep. 71, the validity of a "dog statute" of the State of Michigan was discussed, and on motions to dismiss or affirm a decision sustaining the constitutionality of the statute, the writ of error was dismissed. Mr. Chief Justice FULLER, in delivering the opinion of the court, said: "This was an action of trespass on the case to recover for personal injuries inflicted on Ruth I. Fye by a dog owned and kept by Chapin, and was based on a statute of the State of Michigan, approved March 28, 1850, which provided that the owner or keeper of any dog injuring any person as set forth should be liable to the person injured 'in double the amount of damages sustained, to be recovered in an action of trespass or on the case;' and also that 'if it shall appear to the satisfaction of the court, by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgm such defendant for double t of damages proved and cos The declaration counted on and asked to have plaintiff' doubled by virtue thereof; a having resulted in a verdic in plaintiff's favor, the cir on motion of her counsel, en ment for double the amoun $20,000. Defendant moved trial, and assigned, amon grounds therefor, that the question was unconstitution in violation of the Const Michigan, and 'in violati constitutional rights of citize public trial in civil cases i record.' The motion for ne denied, and defendant filed t exceptions, the eighteenth teenth of which were that t was in violation of the Fift enth Amendments to the C of the United States. The then carried to the Suprem the State, and ninety-eight e assigned, the ninety-fourt fifth, and ninety-sixth bei effect that the statute was in with the ordinance of 1787 f ernment of the Northwest and with the Fifth and Sixt ments, securing due process the right of trial by jury. preme Court required plainti

injury was received upon the defendant's land, and his defense is that the plaintiff was there in her own wrong, or, at least, at her

$10,000, and, this being done, affirmed the judgment, as so modified, for $10,000. As to the contention that the act was unconstitutional 'in that it confers upon the circuit judge power to act as a chancellor in a suit at law in so far as he exercises the authority to double the damages,' the Supreme Court, without referring to the Federal Constitution, held that it was competent for the legislature to provide for doubling damages in this class of cases, and that the latter portion of the section should be construed to mean that the court, acting through all of its instrumentalities, which included the jury, should ascertain the damages as in ordinary cases, and that, as so construed, the act was valid. 7 Am. Neg. Rep. 67, 80 N. W. Rep. 797. This writ of error was then allowed, and errors assigned in this court, embracing alleged errors committed by the Supreme Court in disregarding certain paragraphs of the brief of counsel in that court which, it was said, asserted the statute to be in contravention of the Fourteenth Amendment. Motions to dismiss or affirm were submitted.

"The validity of the provision creating the liability for double damages is not denied, but the contention seems to be that the statute authorizes the trial judge to determine independently 'the amount of the damages proved,' and is therefore unconstitutional. But this need not be discussed, as we think the writ must be dismissed for want of jurisdiction. If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare. In this case plaintiff, after judgment, excepted to the denial of his motion for a new trial on the ground, among others, that the statute in question was in violation of the Fifth and Seventh Amendments to the Constitution, and repeated that contention in the assignment of errors in the Supreme Court, adding also that the statute was inconsistent with the ordinance of 1787. But the ordinance of 1787 was superseded by the adoption of the Constitution of the United States, and of the State, and the Fifth and Seventh Amendments were intended to operate solely on the federal government, and contain no restrictions on the powers of the State. The only reference to the Fourteenth Amendment is in the assignment of errors in this court, where it is stated that the State Supreme Court disregarded certain portions of counsel's brief alleged to have treated of that subject. This did not meet the requirements of sec. 709 of the Revised Statutes. Zadig *v.* Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Dewey *v.* Des Moines, 173 U. S. 198, 43 L. ed. 666, 19 Sup. Ct. Rep. 379; Keokuk & H. Bridge Co. *v.* Illinois, 175 U. S. 633, 44 L. ed. 302, 20 Sup. Ct. Rep. 205. Writ of error dismissed." Mr. Justice BROWN dissented, and said: "It appears in this case that defendant intended to claim the benefit of the "due process of law" clause of the Fourteenth Amendment, but inadvertently pitched his claim upon the Fifth Amendment, which also contains a similar clause, but is only applicable to proceedings in the federal courts. The mistake is so obvious I think the court should have disregarded it, and passed upon the merits."

See FYE *v.* CHAPIN *(Michigan, 1899)*, 7 AM. NEG. REP. 67, for report of the case in the Supreme Court of Michigan.

own risk. The plaintiff was in service in the neighborhood, be inferred, of the defendant. At the invitation of a frie was a friend of the defendant's servants, the plaintiff went v to call upon them. This may have been technically open to (but it was uncontradicted, and the defendant did not desire pute it. They were approaching the back door of the hou back way, when the dog rushed out, and bit the plaintiff. was controverted evidence that the plaintiff heard barking approached the house. Subject to exception, the court ins the jury that the plaintiff was not a trespasser, and could re she was in the exercise of due care..

It does not seem to us to need argument that the plaintiff a trespasser. "There are cases * * * when the l imply a license * * * from the usages of the comı Thus, it has been held that the entry upon another's close, his house, at usual and reasonable hours, and in a customai ner, for any of the common purposes of life, cannot be rega a trespass." Lakin *v.* Ames, 10 Cush. 198, 220; Hawks *v.* 139 Mass. 205, 207, 1 N. E. Rep. 543.

The private way upon which the plaintiff seems to hav traveling imported a license to approach the house for a soc pose familiar to every one, according to a practice common part of the world. Therefore it is unnecessary to consider w if the plaintiff were a trespasser, she could recover. On hand, it may be assumed that a burglar bitten by a dog wou no standing in court, as the use of the dog probably woul been a legitimate defense not excluded by the statute. On th hand, if the plaintiff manifestly was threatening no harm, dog was set upon her, or if it was kept with intent that it attack all comers, the case might fall within the principle spring-gun cases, as explained in Chenery *v.* Railroad Co., 16 211–213, 35 N. E. Rep. 554, 22 L. R. A. 575.

In a case between the extremes just suggested, such as sented by the facts before us, fairly taken, where there malevolent intent on the defendant's part, it has been he even there the fact that technically the plaintiff was tres would not prevent a recovery at common law for an injur animal known to be dangerous (Marble *v.* Ross, 124 Ma Loomis *v.* Terry, 17 Wend. 496; Sherfey *v.* Bartley, 4 Sne compare Quigley *v.* Clough, 173 Mass. 429, 430, 6 Am. Ne 291, 53 N. E. Rep. 884); and, on stronger grounds, under a like ours (Woolf *v.* Chalker, 31 Conn. 121, 132). However th

be, we are of opinion that in the case of a licensee, which the plaintiff was, the statute applies. While, no doubt, a licensee must take some active forces upon the defendant's premises as he finds them, and cannot demand or expect precautions to be taken on his account, for instance, in the case of railroad trains run in the usual way upon tracks which the plaintiff is permitted to cross, there are others which, even at common law, the landowner could not set loose in undefined courses without regard to the lawful presence of others upon his land. He might be liable for random shooting with a rifle in a pasture where he permitted the public to pick berries, and, on the same principle, for allowing a dog known by him to be ferocious to range there unrestrained. Kelly *v.* Tilton, 2 Abb. Ct. App. Dec. (N. Y.) 495 (1). The statute makes it unnecessary to prove the owner s knowledge of the character of the dog, or of the danger, and imposes the double liability in any case where at common law an owner knowing the danger would be liable. Whether it goes further we need not consider. Its language is broad, and we do not mean to limit it to the cases just mentioned.

The plaintiff testified that she did not hear barking upon the defendant's land. The defendant was allowed to go to the jury upon the question of her due care. This was sufficiently favorable for him. Raymond *v.* Hodgson, 161 Mass. 184, 185, 36 N. E. Rep. 791.

Exceptions overruled.

CARTER v. BOSTON AND ALBANY RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, December, 1900.

VOLUNTEER ASSISTING FRIEND INJURED BY FALL OF IRON AT FREIGHT HOUSE — BURDEN OF PROOF — DIRECTING VERDICT. — In an action to recover damages for injuries sustained by the fall of a piece of iron, it appeared that plaintiff went with a friend to defendant's freight house as a volunteer to assist his friend to ship some freight. The freight-house door was locked, but no freight was being received on the day of the accident, though plaintiff did not know this. He took hold of

1. See the following cases, cited in the case at bar: Marble *v.* Ross, 124 Mass. 44, 1 Am. Neg. Cas. 143, 424; Loomis *v.* Terry, 17 Wend. (N. Y.) 496, 1 Am. Neg. Cas. 223; Woolf *v.* Chalker, 31 Conn. 121, 1 Am. Neg. Cas. 65; Kelly *v.* Tilton, 2 Abb. Ct. App. Dec. (N. Y.) 495, 1 Am. Neg. Cas. 198; Raymond *v.* Hodgson, 161 Mass. 184, 1 Am. Neg. Cas. 130.

the chain with which the door was locked and shook and rattled it he could get in, when a piece of iron weighing about 700 pounc stood on the platform leaning against the freight house fell on injured him. The accident happened on February 22 and the piec had stood there since November 11, preceding. A verdict was dir defendant. *Held*, that the direction of verdict for defendant was the mere fact that the piece of iron was placed by defendant on form leaning against the freight house, was not of itself evidenc ligence, and the burden of proof was on plaintiff to show that the was due to defendant's negligence (1).

EXCEPTIONS from Superior Court, Worcester County.

Action by William Y. Carter against the Boston & Albai road Company to recover for injuries. From a judgm defendant, plaintiff brings exceptions. *Overruled.*

J. R. KANE, for plaintiff.

F. P. GOLDING, and W. C. MELLISH, for defendant.

MORTON, J. — A comrade of the plaintiff had occasion t the defendant's freight house in Spencer from his father's carry some crates of eggs for shipment by the defendant' The plaintiff went with him as a volunteer to assist hin freight house door was locked, and no freight was being r on that day, though the plaintiff did not know this. The took hold of the chain with which the door was locked, an and rattled it, for the purpose of seeing if he could not get he turned away, a piece of iron weighing about 700 pounds stood on the platform, nearly upright, leaning against the the house, fell on him, causing the injuries complained o accident happened on February 22, 1899, and the piece of i stood there since November 11th preceding. This actio recover for the injuries thus sustained. The presiding directed a verdict for the defendant, and the case is here plaintiff's exceptions. We think that the ruling was right. ing, without deciding, that the plaintiff was on the defe premises, under such circumstances as to entitle him to pr from defendant's negligence, and assuming, also without d that the fact that it was a legal holiday made no differenc defendant's duty in that regard, the plaintiff was bound to s a fair preponderance of the evidence that the accident was the defendant's negligence. The mere fact that the piece was placed by the defendant on the platform, leaning aga side of the house, was not of itself evidence of negligence

1. See Note on LIABILITY OF MASTER FOR INJURY TO VOLUNTEER, appended to Cleveland, etc., R. Co. v (Ohio), *post.*

defendant had a right to place it there; and according to the undisputed testimony it had stood there securely since early in the preceding November. There were marks on the platform and the side of the building showing where it had stood, and that it was placed in a secure position originally. The only circumstance tending to show negligence on the defendant's part is the fact, if it was a fact, that the iron fell in consequence of some slight and inadvertent touch or push on the plaintiff's part. But whether that was so, and what the immediate cause of the fall was, is wholly a matter of conjecture. The case is not one, we think, where, in the absence of explanation by the defendant, proof of the accident furnishes evidence of negligence on its part. In view of the size and weight of the piece of iron, and of the fact that it had stood securely in the same position since the previous November, the improbability of its fall having been occasioned by a slight and inadvertent touch or push on the part of the plaintiff was so great as to render it purely conjectural whetner the fall could have been caused in that manner. We have not considered whether the plaintiff was anything more than a mere trespasser.

Exceptions overruled.

LAMB v. CITY OF WORCESTER.

Supreme Judicial Court, Massachusetts, October, 1900.

DEFECT ON SIDEWALK — QUESTION FOR JURY. — Whether hinges on bulkhead doors, projecting about two inches above the level of the sidewalk, constitute defects in the sidewalk which the city, in the exercise of reasonable care, should have remedied, was properly submitted to the jury in an action against the city for injuries sustained by reason of such alleged defects (1).

PEDESTRIAN INJURED ON SIDEWALK — DUE CARE. — Whether plaintiff who, on a bright, sunshiny day, without anything to distract her attention, caught her foot against a projection on the sidewalk and fell, exercised due care, was properly submitted to the jury.

APPEAL from Superior Court, Worcester County.

Action by Margaret Lamb against the city of Worcester. From verdict for plaintiff, defendant excepts. *Exceptions overruled.*

WEBSTER THAYER and HOLLIS W. COBB, for plaintiff.

ARTHUR P. RUGG and ERNEST I. MORGAN, for defendant.

1. For other actions relating to Liability of Municipal Corporations for Defective Sidewalks, from 1897 to date, see vols. 1-9 AM. NEG. REP., and the current numbers of that series of REPORTS.

MORTON, J. — This is an action to recover for personal sustained by the plaintiff by reason of an alleged defect in t walk along which she was walking at the time of the acci Front street, in Worcester. The sidewalk was fifteen and feet wide at the place of the accident. Ten feet of the s from the street edge consisted of granite slabs. The remain and one-half feet "consisted of what is known as 'Hyatt Lig struction,' being an iron frame, with circular glass insertions light to the basement under the sidewalk." The alleged def in this Hyatt light construction, and was a Hyatt light bu which consisted of two flat doors, shutting together in the and opening upward and outward, and being together abo and one-half feet square. There were four hinges to these The hinges projected from one and one-half inches to one and sixteenths inches above the level of the sidewalk. The doo even and level on top, and were from one and one-eighth to one-quarter inches above the other level of the sidewalk, a smooth and rounded at the edges, "except that there was angle made between the hinge and the main part of the bu extending upward from the level of the sidewalk, the heigh point where the plaintiff caught her foot being one and inches." The rest of the sidewalk, "except as affected bulkhead, was smooth and safe, and convenient for travel."

There was evidence tending to show that the accident ha at about eleven o'clock in the forenoon of a bright, sunshin December, and that the plaintiff was walking along with panion, without anything to distract her attention, wh "caught her foot against the corner of the main part of th head and hinge and fell," and received the injuries complai The defendant contends that the bulkhead did not const defect, and that the plaintiff was not in the exercise of du Instructions to that effect were requested by it, and were r and the defendant excepted. There was a verdict for the p Whether projections of the character described, from an ot smooth and level sidewalk, constitute defects in the sidewalk the defendant, in the exercise of reasonable care, shoul remedied, seems to us to have been properly submitted to th In view of recent decisions, we do not see how it could ha ruled as matter of law that they did not constitute defects. ford *v.* City of Woburn (Mass.), 8 Am. Neg. Rep. 249, 57 Rep. 1008, and cases cited. The defendant relies upon Ray City of Lowell, 6 Cush. 524. But in that case the alleged consisted of a sewer grate resting against the edge of the cur

of a sidewalk, and projecting an inch or two above it, and it was held that a person who chose to cross the street at that point, and tripped over the grate, could not recover. Dowd *v.* Inhabitants of Chicopee, 116 Mass. 93, 95. But in this case the defect was in a smooth and otherwise level sidewalk at a place where the plaintiff had a clear right to pass. Moreover, though Raymond *v.* City of Lowell has been frequently cited and recently cited (see Newton *v.* City of Worcester, 174 Mass. 181, 188, 54 N. E. Rep. 521), it has also been questioned (George *v.* City of Haverhill, 110 Mass. 506, 511; Marvin *v.* City of New Bedford, 158 Mass. 464, 467, 468, 33 N. E. Rep. 605).

We also think that the question of plaintiff's due care was rightly submitted to the jury. Even in the absence of anything to distract her attention, she was not required to keep it entirely on the sidewalk in front of her as she walked along, and to observe where each footstep was taken. She had a right to rely somewhat on the smooth and level character of the sidewalk generally, and on its being free from dangerous defects. The extent to which she could properly do so, under the circumstances, was eminently a question for the jury. Redford *v.* City of Woburn, *supra.*

Exceptions overruled.

LAMSON v. AMERICAN AX AND TOOL COMPANY.

Supreme Judicial Court, Massachusetts, November, 1900.

EMPLOYEE INJURED BY FALL OF HATCHET — ASSUMPTION OF RISK. — Where plaintiff, an employee of defendant, was injured by the fall of a hatchet from a rack while he was at work, and it appeared that he complained to defendant's superintendent of the danger of the rack, but was told that he would have to use the same or leave, and he continued to work, he was held to have assumed the risk and could not recover for injuries sustained thereby (1).

1. For other actions arising out of Liability of Master for Injuries to Servants, and the question of assumption of risk, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See NOTE ON ASSUMPTION OF RISK, 7 AM. NEG. REP. 97–111.

Among recent actions arising out of the relations of master and servant, are the following:

Employee's hand caught in machine — Assumption of risk. — In SILVIA *v.* WAMPANOAG MILLS *(Massachusetts, November, 1900)*, 58 N. E. Rep. 590, the case was stated by the court (*per*

EXCEPTIONS from Superior Court, Worcester County.

Action by Henry O. Lamson against the American Ax & Tool Company. From judgment for defendant, plaintiff brings exceptions. *Overruled.*

E. H. VAUGHAN and F. P. BRADY, for plaintiff.

HERBERT PARKER and CHAS. C. MILTON, for defendant.

HOLMES, Ch. J. — This is an action for personal injuries caused by the fall of a hatchet from a rack in front of which it was the

LATHROP, J.), as follows. "The plaintiff was injured while in the employ of the defendant by reason of his hand being caught in the beater of a picker machine, which, he testified, started in consequence of a defective shipper shifting the belt which ran the machine from a loose pulley to a fixed one. Two or three days before the accident he noticed that the machine started of itself, and, upon investigation, found that, while there was nothing the matter with the machine, one of the prongs of the shipper had become worn by use, and would not keep the belt where it belonged. He then unfastened the shipper, and removed the belt from the fixed pulley to the loose one by means of a stick which he had there. He took the old shipper to the boss machinist, and asked for another, and was informed that there was none on hand, but that one would be procured in two or three days, and was told to put the old shipper back, which he did. On the morning of the accident the plaintiff was engaged in putting a new sieve or cage into the machine, when the overseer came to him and told him that he was short of laps, and that he must hurry and get the machine done, because he wanted to start it up. After some time the plaintiff got the machine started, but the cotton coming through the sieve did not properly go through the rollers. The plaintiff stopped the machine by means of the shipper, put his hand into a chamber adjoining which on one side were the beaters, took out some cotton twice, and the third time his hand was caught. The plaintiff was thirty-three years of age. He had worked six years, altogether, in different mills, and had been at work in the defendant's mill for three years, being 'picker boss' all of that time. His duty was to repair small belts, and to repair the machines when they broke down, if he was able to do it; and, if not able, he would call the machinist. He also had to weigh the laps. He was also told by the overseer to go to the shop if he wanted anything about the machinery. The exceptions state that the machine in question was similar to the one described in De Costa *v.* Hargraves Mills, 170 Mass. 375, 49 N. E. Rep. 735. It is obvious that the plaintiff was an experienced man, and knew all that there was to know about the danger of putting his hands into the chamber in close proximity to the beater when the machine was in motion, or when it was liable to start of itself. Indeed, he testified 'that he would not put his fingers in if he thought the beater was going to start up; that he did not think of it.' He also knew that, with the shipper as it was, there was danger of the machine starting, and he did not look to see whether the old shipper had been replaced by a new one or not. Nor did he attempt to make sure that the belt would remain on the fixed pulley, by using his stick." Judgment for defendant affirmed.

Defective elevator — Negligence of fellow servant — Proximate cause. — In CARTER *v.* J. H. LOCKEY PIANO CO.

plaintiff's business to work at painting hatchets, and upon which the hatchets were to be placed to dry when painted. The plaintiff had been in the defendant's employment for many years. About a year before the accident new racks had been substituted for those previously in use, and it may be assumed that they were less safe, and were not proper, but were dangerous, on account of the liability of the hatchets to fall from the pegs upon the plaintiff when the racks were jarred by the motion of machinery near by. The plaintiff complained to the superintendent that the hatchets were more likely to drop off than when the old racks were in use, and that now they might fall upon him, which they could not have done from the old racks. He was answered, in substance, that he would have to use the racks or leave. The accident which he feared happened, and he brought this suit.

The plaintiff, on his own evidence, appreciated the danger more than any one else. He perfectly understood what was likely to happen. That likelihood did not depend upon the doing of some negligent act by people in another branch of employment, but solely on the permanent conditions of the racks and their surroundings and the plaintiff's continuing to work where he did. He complained,

(Massachusetts, October, 1900), 58 N. E. Rep. 476, the case was stated by MORTON, J., as follows: "This is an action to recover for injuries sustained by the plaintiff while engaged in taking a loaded truck from an elevator in defendant's factory. The declaration is at common law, for allowing the elevator to be in an unsafe and dangerous condition. The defect complained of is that the rising or lifting belt was loose, and failed to cause the elevator to rise when it should have done so. The testimony showed that the elevator was operated by three ropes or cables, — one for raising it, one for lowering it, and one for stopping it. There was also a clamp or device which, when used, held the elevator so that it could not move. At the time of the accident the plaintiff and one Greenlaw were engaged in taking a truck loaded with sticks of elm wood from the street floor to the basement. Greenlaw was operating the elevator. When they reached the basement the elevator went a little below the level of the floor. Greenlaw raised and lowered it twice in the effort to get it level with the floor, and the third time it would not lift, and stood still. Thereupon the plaintiff said it was level on the other side, and he would take the truck off that way. As they took the truck off, the elevator started up, and tipped over the load onto the plaintiff, causing the injury complained of. 'At the time of the accident, Greenlaw pulled with his left hand, and the elevator stopped instantly.' Assuming that the belt on the lifting pulley was loose, we do not see what that had to do with the accident. When the elevator stopped, the belt was on the lifting pulley. Greenlaw left it there, and trusted to the elevator remaining stationary, instead of pulling the stopping rope or cable, as it is evident that he did an instant later, when the accident happened, and the elevator instantly stopped, or instead of using the clamp, which would have held the elevator so that it could not

and was notified that he could go if he would not face the chance. He stayed, and took the risk. Carrigan *v.* Manufacturing Co., 170 Mass. 79, 81, 48 N. E. Rep. 1079. See Lewis *v.* Railroad Co., 153 Mass. 73, 77, 26 N. E. Rep. 431, 10 L. R. A. 513; Prentiss *v.* Manufacturing Co., 63 Mich. 478, 482, 30 N. W. Rep. 109. He did so none the less that the fear of losing his place was one of his motives. Leary *v.* Railroad Co. 139 Mass. 580, 587, 2 N. E. Rep. 115; Haley *v.* Case, 142 Mass. 316, 322, 7 N. E. Rep. 877; Westcott *v.* Railroad Co., 153 Mass. 460, 27 N. E. Rep. 10; 1 Bailey, Pers. Inj., secs. 880–885.

Exceptions overruled.

move. The accident was due to Greenlaw's negligence in not using the stopping cable or the clamp, and not in any proper sense to the looseness of the lifting belt. If the looseness of the belt can be said to have had anything to do with the accident, it was altogether too remote." Judgment for defendant affirmed.

Boy's hand caught in circular saw — Dangerous employment — Failure to warn — Master liable. — In JARVIS *v.* COES WRENCH CO. *(Massachusetts, November, 1900)*, 58 N. E. Rep. 587, it appeared that "plaintiff was a boy fifteen years old on July 18, 1898. On August 1, 1898, he went to work in the defendant's factory, and was injured the 1st of the following April. Until within three weeks of his injury he was at work on a 'groove machine,' and was then directed to go upstairs and saw blocks by a circular saw. He was asked if he could do it, and he said, 'No.' He was then directed to go up, and was shown how to saw short blocks. There was a gauge on the saw, and it ran in a groove. The block to be sawed was put against the gauge, and pushed by a handle against the saw. After working on the short blocks, he was set to work sawing long blocks three days before the accident. The gauge was removed, and the plaintiff was told to catch hold of the end of the block and press it up against the saw. He received no further instructions." The court (*per* LATHROP, J.), said: "While it may be said that the plaintiff knew that there was some danger in working on a circular saw, yet he had no knowledge that there was danger of the piece of wood bounding back. This danger the jury might well have found was known to the defendant, and it was bound to see, before the plaintiff was set to work on the machine, that he was duly instructed on this point. This was a duty which could not be delegated." (Citing Wheeler *v.* Mfg. Co., 135 Mass. 294.) Judgment for plaintiff affirmed.

McCRUM v. WEIL AND COMPANY.

Supreme Court, Michigan, December, 1900.

PERSON INVITED TO SHIPPING ROOM OF STORE FALLING DOWN UNGUARDED ELEVATOR OPENING — NEGLIGENCE FOR JURY. — Plaintiff's decedent, a man sixty-three years old, went to the store of the defendant company, went into its shipping room, fell into the open shaft of an elevator, and was killed. He was invited into the shipping room by defendant's shipping clerk, which room was close to the elevator, the gate of the elevator shaft being left open. The negligence charged was the failure to protect the shaft by closing the gate. The trial court directed a verdict for defendant on the ground of contributory negligence of the deceased. *Held*, that the court erred in taking the case from the jury, the question of negligence being for them to determine (1).

ERROR to Circuit Court, Wayne County.

Action by Catherine McCrum, administratrix of Henry McCrum, deceased, against Weil & Co. From judgment directed for defendant, plaintiff brings error. *Judgment reversed.*

"Plaintiff's decedent went to the store of the defendant company, went into its shipping room, fell into the open shaft of an elevator, and was killed. The name of the shipping clerk was Stowell. Mr. McCrum and Mr. Newman went to the store about the same time (midday) on business. A clerk named Marx took them to or near the door of the shipping room, called Mr. Stowell, and told him there were two gentlemen for him to wait upon. Mr. Newman handed Stowell a receipt for a mattress. Stowell, followed by Newman, went to his desk, and, while the two were in conversation, heard a fall, looked around, saw that Mr. McCrum was not in the room, and heard a moaning in the basement. They went to the shaft, and there found Mr. McCrum lying at the bottom. He was unconscious, and died shortly after. No one saw deceased after entering the shipping room, and how he fell into the shaft is matter of conjecture. This shipping room was ten feet high, thirty feet four inches long, and fourteen feet four inches wide. There were two windows in the rear wall, each three feet nine inches wide, three feet four inches from the floor, and extending to the ceiling. Each was about six feet from the outside wall on each side. Between the windows was a door five feet one inch wide, which was open at the time. The elevator shaft is in the northwest corner of the room, is

1. See NOTE ON LIABILITY FOR INJURIES TO CUSTOMERS AND EMPLOYEES IN STORES AND PLACES OF BUSINESS, 8 AM. NEG. REP. 266–270.

eight feet three inches wide, and six feet four inches deep. From the left edge of the door, where the deceased entered, to the elevator shaft is nine feet. The shipping clerk's desk was in the southwest corner, back of the elevator, and the distance from the desk to the corner of the shaft was twenty-six inches. The sides of the elevator are inclosed. The front is open to the ceiling. Back of the shipping room, and running past the door and windows, is an alley eighteen feet wide, with a one-story building opposite. An electric light was burning at the time in the corner of the room over the shipping clerk's desk. The elevator had just gone to the story above with a load of goods. There was a gate three feet high in front of the shaft, which was pushed up and down by hand. This gate the parties using the elevator had neglected to close. The negligence charged is the failure to protect this shaft by closing the gate.

"The court directed a verdict for the defendant, on the ground of contributory negligence on the part of the deceased. The defendant introduced no testimony. The principal disputed question of fact in the case is whether the space between the door and where plaintiff entered the elevator shaft was substantially unobstructed, or was obstructed by goods, leaving a narrow pathway from the door to the clerk's desk. Mr. Stowell testified that the place was obstructed, but that a passageway about three feet wide was left from the door to his desk, while Mr. Newman testified that the space was practically clear. Stowell and Newman do not agree upon one other question. Stowell testifies that the elevator was in sight, going up, when Newman and deceased entered the room, while Newman says it was not in sight."

FLOWERS & MOLONEY and OSCAR M. SPRINGER, for appellant.

KEENA & LIGHTNER, for appellant.

GRANT, J. (after stating the facts). — We think the learned Circuit judge erred in taking the case from the jury. The deceased was invited into this place. He had a right to follow the clerk to the desk for the transaction of his business. He was sixty-three years old, and wore glasses. Some of the witnesses testified that it was not very light in the room when they went in, and, though they "could see all right," yet they testified that it was quite dim. A light was burning, which would shine directly in the eyes of the deceased, who was approaching, unless his eyesight was obstructed by those walking ahead of him. The course in which he was invited to walk was in close proximity to the open shaft. While all the other witnesses testified that they could see the shaft, yet their eyesight may have been better than was that of the deceased. The

defendant cannot escape the liability by showing that young persons, whose eyesight was good, could see and avoid the danger, but was equally bound to protect the place, against those who came to his place of business with eyes more or less dimmed by age or other causes. It invited the general public into its place of business. It was required by the law to keep such place reasonably safe for all classes whom it invited. The case should have been submitted to the jury.

Judgment reversed, and new trial ordered. The other justices concurred.

MERRITT v. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court, Minnesota, December, 1900.

ENGINEER JUMPING FROM ENGINE TO AVOID COLLISION — CONTRIBUTORY NEGLIGENCE — VERDICT SET ASIDE. — 1. In the operation of railroad trains, where the company rules charge both the conductor and engineer with the control and management of their trains, if one assumes to attend to an act within their common line of duties, which act may be performed by one, the other may rely upon the presumption that such act was properly performed. Rule applied in this case, and *held* that the engineer had a right to assume that the conductor and trainmen had repaired a leaky air pipe without cutting off the air brake from part of the train.

2. The plaintiff, as an engineer, was by the rules of the company made responsible for the control and management of his train; was obliged to make proper tests of the air brakes at grades and stations, and have his train under control while approaching stations; running an inferior extra train, he was charged with the duty of knowing the position of all regular trains, they having the right of way. Having approached a station at the rate of twenty-five miles an hour, and collided with a regular train, *held*, under the circumstances of this case, that he was guilty of contributory negligence (1).

1. See Note on Persons Jumping from Trains, etc., to Avoid Imminent Danger, 9 AM. NEG. REP. 2-5, *ante*.

Among other recent actions relating to ACCIDENTS TO RAILROAD EMPLOYEES, are the following:

Brakeman killed by train plunging into stream — Track inspection — Evidence — Assumption of risk. — In MAYDOLE ET AL *v.* DENVER & RIO GRANDE R. R. CO. *(Colorado, November, 1900)*, 62 Pac. Rep. 964, an action to recover damages far the death of plaintiff's intestate, a brakeman in defendant's employ, who was killed by the train plunging into a stream, the bridge across which had been burned, the facts are stated by THOMSON, J., as follows: "A freight train of the Denver & Rio Grande Railroad, upon which Jesse L. Maydole

3. Such negligence in the care and management of his train appears conclusively from plaintiff's own personal statements and theory of the accident, and there is no reasonable probability of a different line of evidence or theory being produced in good faith at another trial, and the order for judgment notwithstanding the verdict should be sustained.
(Syllabus by the Court.)

APPEAL from District Court, Kandiyohi County.

Action by Charles H. Merritt against the Great Northern Railway Company. Verdict for plaintiff. From an order granting defendant's motion for judgment notwithstanding the verdict, plaintiff appeals. *Affirmed.*

F. D. LARRABEE, for appellant.

C. WELLINGTON, for respondent.

LEWIS, J. — Plaintiff was an engineer in the employ of the defendant company. On the 27th day of February, 1899, he was ordered

was a brakeman in the employ of the railroad company, while proceeding westwardly from Gunnison city, plunged into a stream, the bridge across which had been burned, with the result that Maydole lost his life. The accident occurred in the early morning of October 23, 1896. The wife of Maydole being dead, his children, Etta M. and Fern G., by their guardian, Frank B. Eells, brought this statutory action against the Denver & Rio Grande Railroad Company to recover damages for the loss of their father, alleging that his death was due to the negligence of the defendant. At the trial, when the plaintiff rested, on motion of the defendant a nonsuit was adjudged, and the plaintiff appealed. Substantially, the evidence was as follows: The railroad track east of the bridge was very crooked, being a succession of curves; but the bridge was reached by a stretch of straight track about 300 feet in length. An engine and train of the defendant crossed the bridge between 8 and 9 o'clock on the night of the 22d, and it was then sound. The number of the engine was 272, and the name of the engineer Monahan. When the bridge was reached by the train on which Maydole was brakeman, about 3:30 o'clock in the morning of the 23d, it was burned down, and the fire was out. A rain which had fallen had extinguished the fire. Prior to, and perhaps during, 1892, the road was inspected by track walkers day and night: but some time in or about the last-mentioned year night inspection was discontinued. Monahan, the engineer of the train which crossed the bridge between 8 and 9 o'clock, was interrogated concerning track walkers." * * * "The plaintiff undertook to show that engine No. 272 was defective, to the knowledge of the defendant, and that fire which fell from it in consequence of its defective condition caused the destruction of the bridge; but the effort was a failure. While the engine was at one time out of order, it had been repaired, and when it crossed the bridge on the night of the 22d, it was in good condition. No inference is to be drawn from the evidence that there was any connection between the engine and the fire. But we think that the question whether, upon the evidence in this case, it was incumbent on the defendant to provide night track walkers over the portion of its line described in evidence, should have been submitted to the jury. It

to run an extra freight train from St. Cloud to Clearwater Junction. The train consisted of five box cars and a caboose, which, with the exception of the latter, were equipped with air brakes. The train crew consisted of the plaintiff, as engineer, a fireman, two brakemen, and a conductor. A short distance out from St. Cloud the air pipes sprung a leak, and the train was stopped. The conductor and brakemen who were at the rear end, instead of repairing the leak, cut off the air from the three rear cars, leaving the air brake to apply to the two front cars only, but they did not notify the fireman

is the duty of a railroad corporation to know the condition of its track, so far as such condition can be known by the exercise of reasonable care and diligence; and it must be inspected with sufficient frequency to assure its safety. The rule is thus stated in Railway Co. *v.* Swett, 45 Ill. 197: 'It is the duty of railroad companies to keep their road and works and all portions of the track in such repair, and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others.' See also Railroad Co. *v.* Ogden, 3 Colo. 499; Quayle *v.* Railroad Co., 63 Mo. 465; Railroad Co. *v.* McComas, 7 Colo. App. 121, 42 Pac. Rep. 676. This bridge burned down between 9 o'clock at night and 3·30 o'clock of the following morning. Night track walkers might have discovered the fire, and warned the train in time for the avoidance of injury. The track on which the train proceeded was very crooked, and but little of it could be seen at once, even in daylight. The fire which had consumed the bridge was extinguished, so that in the darkness, even if the track ahead had been straight, there was nothing to indicate the disaster to the bridge. It seems to have been the judgment of the defendant that it was necessary that the track should be inspected during the day: but, without any knowledge of the mysteries of railroad management, it occurs to us that the reasons which required day inspection would operate with much greater force at night, and we think that such is the logic of the facts of this very case. Whether night track walkers in the locality of the accident were necessary, and whether the want of night inspection constituted negligence, were questions for the jury to answer. The evidence was sufficient to require the submission of those questions, and the refusal of the court to permit the jury to pass upon them was error. Railroad Co. *v.* Wilson, 12 Colo. 20, 20 Pac. Rep. 340.

"It is suggested for the defendant that, from the long time Maydole had been in the service of the defendant, he must have known that night track walkers had been withdrawn, and that by continuing in the service of the defendant after acquiring the knowledge he assumed the risk of the accident which afterwards overtook him. There was no evidence, and we do not think there is any presumption, that he had any knowledge on the subject. But, conceding the fullest knowledge in him, we do not think, when we regard the nature of the fact which he knew, and the duties required of him in his employment, that his knowledge was necessarily a bar to his suit, or, at the very furthest, was anything more than a circumstance to be considered by the jury in connection with the other evidence. The alertness requisite to the proper discharge of his duties would almost necessarily render him forgetful, while he was engaged in his work, of anything he might have

or engineer of that fact. The train proceeded, and about two hours later was approaching Osseo station at a rapid speed, when, discovering that a train was upon the main track in front of him, the plaintiff, seeing that a collision was inevitable, applied the air, and jumped from the engine, receiving the injuries complained of. Plaintiff had a verdict, the court granted defendant's motion for judgment notwithstanding the verdict, and plaintiff appealed. The questions presented for review in this case must be considered with reference to the order for judgment *non obstante*. To sustain this

known concerning the track walkers; and by the discontinuance of night inspection he was not exposed to any certain danger. Snow *v.* Railroad Co., 8 Allen, 441; Plank *v.* Railroad Co., 60 N. Y. 607." Judgment reversed.

Railroad employee killed by being thrown from train — Pleading — Unsafe place — Contributory negligence. — In COYLE *v.* PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS R'Y CO. *(Indiana, November, 1900)*, 58 N. E. Rep. 545, an action to recover damages for death of plaintiff's intestate, an employee of defendant, caused by being thrown from train due to alleged defect in track, the complaint alleged that it had long been the custom of the defendant to permit all persons hired to work on the road to ride from their work at North Madison to their residences in Madison on any freight train belonging to defendant, without special permission or pass, and that said custom was well known to both Welch and the defendant; "that it was the custom, rule, and practice of said company that no caboose or passenger coach of any kind was hauled on said freight trains from North Madison to Madison, but all persons riding on said freight trains were permitted to ride down hill from North Madison to Madison on the freight cars attached to said train; that, relying upon said custom as aforesaid, and with the permission, knowledge, and consent of the defendant, its agents, servants, and employees, the said Thomas Welch, within a very short time after he was informed by said section foreman that his services would not be needed or required at said time, did on said day board a freight train which at said time was standing on defendant's track at or near the depot of said defendant at the station of North Madison, which said freight train was run, managed, and operated by the servants and employees of said defendant, and which said train had no caboose or passenger car attached, and all the cars of which said train was composed were filled up with freight, and the doors of all of said cars were locked and barred; that it was at said time against the rules of said company to permit such laborers to ride on the engine attached to said freight trains; that after boarding said train the said Welch took a position on the front platform of the last freight car attached to said train, which said position was the safest place available for him to take on said train at said time, and he was standing, firmly grasping the brake rod affixed to said car;" that on the journey to Madison the defendant so negligently managed said train that in passing over the defective part of the track, without fault of the plaintiff's intestate, but solely on account of the negligence of the defendant in suffering its track to so be and remain out of repair, and in the negligent management of the train, the train gave a sudden jerk, and the plaintiff's intestate was suddenly jerked and thrown from his footing on said car to the ground and injured, from

order, it must conclusively appear that the defendant was not guilty of negligence, or, if such is not the fact, then that the plaintiff was guilty of contributory negligence. Such result must not only be established conclusively from the evidence taken upon this trial, but it must also appear that from the very nature of the charge made against the defendant, and the circumstances connected with it, there is no reasonable probability that upon another trial any substantially different evidence would be produced. Appellant's theory of recovery is that if the air brakes had been adjusted to, and not

which injuries he died, etc. Appellee's demurrer was sustained to the complaint, and, appellant refusing to amend, judgment was rendered against him. On appeal the Supreme Court (*per* HADLEY, J.), after stating the facts, said: "Assuming that the complaint, in its general averments, states a cause of action, it is insisted that the specific facts pleaded affirmatively show not only that the deceased was guilty of negligence contributing to his injury, but also that he assumed the risk. And we are inclined to this view. Conceding to appellant all that he claims, — that appellee was negligent, and that his decedent was a passenger entitled to all the protection that relation requires, and the case stands thus: In the train Welch boarded there was no caboose or passenger coach. He was forbidden to ride on the engine, and all of the cars of the train were filled, and their doors locked and barred. 'With the permission, knowledge, and consent of the defendant,' he boarded the train of his own accord, and, without direction or knowledge of any employee of appellee, he took his position on the deadwood of a freight car, between the first and second cars from the rear, 'as the safest place available to him,' and stood there 'firmly grasping the brake rod.' Boarding the train at such place for transportation, at first blush, appears to be a reckless disregard of personal safety. The general construction, width, and purpose of the 'front platform' (or deadwood) of a freight car, and the jerk of the cars in taking up slack in starting, and sometimes in the motion of the train, and the difficulty of maintaining a fixed position on the deadwood in a sudden jar or jerk, is a matter of common knowledge, of which Welch had no right to be ignorant, and was required to heed. Railroad Co. *v.* Bisch, 120 Ind. 549, 3 Am. Neg. Cas. 257, 22 N. E. Rep. 662. Even if it was the duty of appellee to furnish the deceased tranportation to Madison on a freight train, such duty did not excuse him in voluntarily boarding a train that clearly presented no suitable or safe place for a passenger to ride. He was chargeable with ordinary care of himself, notwithstanding his right to carriage; and the voluntary placing of himself in a position on the train palpably unsuitable for a passenger to occupy, and a place naturally unsafe for him to be during the movement of the train, must be imputed negligence *per se*. In such position he was not a passenger, and therefore appellee owed him no duty, except to avoid wilful injury. Udell *v.* Railroad Co., 152 Ind. 507, 5 Am. Neg. Rep. 562, 52 N. E. Rep. 799; Elliott, R. R., sec. 1851. In Railroad Co. *v.* Hoosey, 99 Pa. St. 492, 10 Am. Neg. Cas. 192, it was held that a passenger riding on the platform of a passenger coach, holding onto an iron rail fixed to the car, when there was standing room inside the coach, and whence, from a sudden jerk from the train, he was thrown to the

cut off from, the three rear cars, he could have controlled and stopped the train in time to avoid the collision, and that so arranging the brakes without notifying him constituted an act of negligence on the part of the defendant which was the proximate cause of plaintiff's injuries. The rules of the company provided that the conductors should be responsible for the safety, prompt movement, and proper care of their trains, and for the conduct of the men employed thereon; also that they must be familiar with the duties

ground and injured, was guilty of such contributory negligence as to preclude his right of recovery, and that the court should have so instructed the jury. In Secor *v.* Railroad Co., 7 Am. Neg. Cas. 547, 10 Fed. Rep. 15, a passenger upon a passenger train, who took position on the lower step of the car, and stood there as the train slowed up for a station, and was thrown off and injured by a sudden jerk of the train, was held to be guilty of contributory negligence. To the same effect, see Hickey *v.* Railroad Co., 96 Mass. 429. Because the position chosen was the 'safest place' to ride counts for nothing. It was not a question of degree. Unless the train afforded some place of apparent safety, he should not have embarked upon it. Judgment affirmed."

Switchman uncoupling cars — Fellow-servants—Gross negligence—Instruction. — In ILLINOIS CENTRAL R. R. CO. *v.* COLEMAN *(Kentucky, November, 1900)*, 59 S. W. Rep. 13, plaintiff, a switchman in defendant's employ, was injured while uncoupling cars under direction of the yardmaster, being struck by the lever used on the coupler. Judgment for plaintiff was reversed for erroneous instruction authorizing jury to find for plaintiff without gross negligence on the part of the yardmaster, as the plaintiff and yardmaster being engaged in the same service, the negligence must be gross.

Brakeman injured coupling cars — Violation of rules — Erroneous instruction. — In NICHOLS *v.* CHICAGO & WEST MICHIGAN R'Y CO. *(Michigan, December, 1900)*, 84 N. W. Rep. 470, plaintiff recovered a judgment against defendant for personal injuries received by him while acting as brakeman. The defendant brings the case here by writ of error. The plaintiff, a married man, about twenty-eight years old, entered the employ of the defendant as freight brakeman in September, 1898. About seven weeks thereafter, after making a coupling between a car having a safety coupler and a car which he claims belonged to the Baltimore & Ohio road that did not have a safety coupler, but a pin and link coupler, he attempted to couple the last-described car to another car where the coupling had to be done with a pin and link. He claims that when he attempted to make the coupling he learned for the first time the car was without a grab iron or hand hold, and as he reached over to put the pin down, he slipped, and his arm was caught between the deadwoods. It appeared that when plaintiff entered defendant's employ he agreed to certain rules as to coupling cars, one of which was the forbidding of the use of the hand in coupling. On the part of plaintiff it was claimed that he coupled the cars according to the universal custom of brakemen under like circumstances, and that there was a waiver of the rules on the part of defendant. The court charged the jury upon that feature of the case as follows: "Among other circumstances proved in this case is an alleged custom on defendant's road that the company permitted cars to be coupled in the manner in which plaintiff attempted to

of the enginemen, firemen, baggagemen, and brakemen, and enforce the rules applicable to them upon their trains. As to enginemen, the rules make them equally responsible with the conductor for the safety of the train, and for the movements of the same in strict compliance with the rules, and they must decline to obey any orders which involve peril to the train or violation of the rules. "Where there is no conductor, or he is disabled, the engineman will have charge of the train, and must be governed by the rules prescribed

couple the one or ones in question, not equipped with safety devices. If that was true, and it conflicted with plaintiff's contract, it was a waiver on defendant's part of plaintiff's agreement not to do so, — not to enter into such dangerous employment, I mean, — if the agreement is construed to conflict with this custom." *Held*, that such instruction was erroneous, the court (*per* MOORE, J.), saying: "We think the charge failed to state the rule correctly, as it did not inform the jury the custom should have been shown to have been so universal and notorious that the company is presumed to know it. The charge also spoke of the custom as proved, when it was for the jury to determine from the evidence whether the custom was proven or not." Judgment reversed.

Yard agent run down by moving caboose — Contributory negligence — Practice. — In SOURS *v.* GREAT NORTHERN R'Y CO. (*Minnesota, November, 1900*), 84 N. W. Rep. 114, plaintiff, while in defendant's employment as a yard agent at Como, was run down one evening about dark by a moving caboose, and brought action to recover damages therefor. Defendant appealed from an order denying its motion for judgment notwithstanding verdict. The syllabus by the court states the case as follows: "Where, in a personal injury action, it appears that a failure on plaintiff's part to establish defendant's negligence, and a failure to relieve himself of a charge of contributory negligence, may have resulted from a ruling upon defendant's objection to the reception of testimony tending to show the existence of a certain usage or custom, the latter cannot be allowed to profit by such ruling upon a motion for judgment notwithstanding the verdict. *Held*, that the trial court did not err when it denied defendant's motion for judgment notwithstanding the verdict."

Yard master falling from flat car — Demurrer. — In FARQUHAR ET AL. *v.* ALABAMA & VICKSBURG R. R. CO. (*Mississippi, November, 1900*), 28 So. Rep. 850, appeal from an order sustaining a demurrer to the complaint in action by appellants against the railway for damages for death of their son and brother, Edward Farquhar, the action of the court was affirmed. The court (*per* TERRAL, J.), stated the case as follows: "Edward Farquhar was the yardmaster of the defendant company at Vicksburg, and in making a transfer of the passenger train across the Mississippi river, and while riding upon a flat car propelled by the switch engine, he was thrown from the car, and received fatal injuries, from which he soon thereafter died. The switch engine was running at the rate of about twenty-five miles per hour, and ran over a large iron nut then accidentally upon the track, which caused the misfortune. A demurrer to the complaint was sustained. The appellants admit that the action of the Circuit Court is in accordance with the decisions of this court in Railroad Co. *v.* Hughes, 49 Miss. 253, and in Dowell *v.* Railroad Co., 61 Miss. 519; but they insist that the rule there laid down is erroneous.

for conductors." "Before leaving a terminal station, the engineman must apply the air brakes, and allow them to remain long enough for the inspectors or trainmen to see that they are in perfect working condition throughout the train, and, when cars have been attached or taken out, the brakes must again be applied, to know that they are in working order before proceeding on the trip. In making regular stops, brakes must be applied in such a manner as to avoid discomfort to passengers or injury to the equipment. Enginemen must also know that the air signal is in proper working

Counsel argue that the rule of law announced in those cases is a barbarism of feudal antiquity, when they say an employee had little or no legal rights, and was slightly removed above a chattel. And counsel then tell us that this rule of feudal barbarism was first promulgated in Priestley *v.* Fowler, 3 Mees. & W. 1. But a look at Priestley *v.* Fowler shows that case was decided in 1833, more than 150 years after feudalism had been abolished in England, and when not a single serf existed in that country, and when it was the boast of English judges that when a slave put his foot upon English soil he thereby became a freeman. The doctrine pertaining to the relation of master and servant is not the outgrowth of feudalism; it belongs to all ages, and society in its most refined and elevated conditions requires its continuance. Indeed, without this relation we should drift back into barbarism. A perusal of the Priestley-Fowler Case will demonstrate the justness of the principles upon which it rests, and those principles have been approved and followed by courts of the highest character and by judges of the greatest distinction. To overrule the several cases of this court holding the doctrine here assaulted would not be justified by the facts of this case. The dropping of the iron nut upon the rails of the track was a mere accident, and the least hint from the yardmaster to the engineer would, doubtless, have brought the engine to a safe speed. That the engineer is not a superior agent or officer to the yardmaster is made manifest by the definition of that relation contained in Evans *v.* Railway Co., 70 Miss. 527, 12 So. Rep. 581. And especially may we not overrule the cases of Railroad Co. *v.* Hughes and Dowell *v.* Railroad Co., since the constitutional convention of 1890, with full knowledge of the doctrine of those cases has, in section 193 of that instrument, defined the rights between employees and railroad corporations, and has left untouched the rights of the parties in cases like the present."

Brakeman injured while trying to scotch moving car — Contributory negligence — Instruction. — In HALTOM *v.* SOUTHERN R'Y CO. *(North Carolina, November, 1900)*, 37 S. E. Rep. 262, the case was stated by CLARK, J., as follows: "The only witness was the plaintiff, who testified that he was in the employ of defendant as a yard coupler and brakeman at Spencer at time of injury, which was April 13, 1898; that at the time of injury he was in the discharge of his duties under the orders and instructions of George Purkinson, the conductor of the train; that the said conductor had the power to discharge him if he disobeyed his orders; that a car had been cut loose and detached from the train in the night-time, and was just barely moving along the track, when the said conductor ordered him to get a rock and scotch it, and that while looking for a rock the conductor brought him one,

order." "Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules."

It is evident from these rules that the conductor and engineer, and to some extent the trainmen, are expected to co-operate together in the control and management of the train, while both the conductor and engineer are charged with the duty of knowing the condition of the appliances. But if one assumes to perform an act in the line of

and while attempting to scotch it the wheel ran over three fingers of his left hand and mashed the ends off; that from the time he was ordered to scotch the car to the time he was injured not more than two or three seconds elapsed; that he got his orders and instructions from said conductor; and that his duty was to obey him. The defendant objected to all of the foregoing evidence relating to his getting orders from the conductor, and his duty to obey him. Objection overruled, and defendant excepted. The plaintiff here rested his case, and the defendant also rested. The court said, 'Proceed with your argument to the jury,' to the defendant's counsel whereupon he arose and insisted that, as the testimony was uncontradicted, the question of negligence was a naked question of law, and that the court ought to direct a verdict on the two first issues one way or the other, and argued that there was no negligence, if the testimony should be believed. At the close of his argument the court said: 'I am with you as to its being a question of law, but I shall charge the jury, if they believe the evidence, to answer the two first issues in favor of plaintiff.' The injury of itself, shows that the act the plaintiff was ordered to perform was dangerous, and therefore the company was liable, unless the injury was caused by the negligent manner in which plaintiff performed the duty assigned him. and, as just said, there was no evidence tending to show contributory negligence." *Held*, that the court ruled correctly as to the law; and that to order plaintiff to get a rock and scotch a rolling car in the nighttime was negligence on the part of defendant, acting through its conductor. *Held*, also, that the burden was on defendant to prove contributory negligence and none was shown. Judgment affirmed.

Section hand injured by derailment of hand car — Defective roadbed. — In WILKIE *v.* RALEIGH & CAPE FEAR R. R CO. *(North Carolina, November, 1900)*, 37 S. E. Rep. 204, FURCHER, J., states the case as follows: "This is an action for damages received by the alleged negligence of defendant company. The plaintiff was an employee of the defendant at the time of the injury complained of, and, while he did not occupy the position of a 'section master,' his business was to do the work of a section master. He and a man by the name of Moring each had a squad of hands that worked under them, doing such work. But neither he nor Moring had any separate part or section of the defendant's road assigned to them, but they worked on any part of the road, under the directions of Mr. Mills, the president and superintendent of the road; that the plaintiff had been sick and absent from the road, at his home in Chatham county, for two weeks just before he received this injury; that on his return to his work Mr. Mills furnished him with a bill or memorandum of eleven

duty pertaining to both, the other would be justified in assuming that such act was properly performed. In this case, if the repair to the air pipe was attended to by the conductor or under his supervision, and if the plaintiff had a right to assume that the three last cars had been adjusted to the air, then, in so far as such act on the part of the conductor contributed to the injury, defendant would be responsible. However, an examination of the evidence leads to the inevitable conclusion that the incident above stated was not the proximate cause of the accident, and, on the contrary, establishes

points on the road that needed repairs. The ninth of these was in the following language: '9. Low joint south of second trestle below Willow Springs;' and it is contended by the defendant that this is the point at which the injury occurred. But this was disputed by the plaintiff, and both sides introduced evidence as to this being the point where the injury was received. The plaintiff and crew that worked under him were traveling over the road on a hand car at the time of the injury, the plaintiff standing upon the car when it became derailed, and, from the sudden jar, the plaintiff was thrown off and injured. The theory of the plaintiff is that there was what is called a 'dodged joint' in the road at this point; that defendant's duty was to keep its roadbed in good repair; that it was its duty to know if it was not in good condition, and that in fact it did not know that its road was not in good condition, and that it negligently allowed it to remain in bad condition, and that this negligence was the cause of the plaintiff's injury. The defendant contended that the plaintiff's own negligence was the cause of his injury; that he was running this car at too great speed at the time of the injury, by reason of which the car was derailed; that the car was worked by means of a lever, and was jerked off the track by the violent manner in which the lever was worked; that the plaintiff had been cautioned by the defendant against running his car so fast over the road, but continued to do so, in violation of the orders of defendant; that, had the plaintiff been running his car at a proper rate of speed, the accident would not have occurred; that in this way the plaintiff by his own negligence was the author of his injury, and was not injured by the negligence of the defendant. The defendant also contended that the plaintiff was employed by defendant to do this work, and that he assumed the risk of danger and damage connected therewith, and that he cannot recover on that account." *Held*, that failure to maintain a safe roadbed for the use of employees was negligence on the part of the railroad company; that the burden was on the company to show that the injury to plaintiff was not caused by its negligence. Judgment for plaintiff affirmed.

Brakeman injured by defective brake — Statute — Erroneous instruction. —In CINCINNATI, HAMILTON & DAYTON R. R. Co. *v.* HEDGES *(Ohio, November, 1900)*, 58 N. E. Rep. 804, judgment for plaintiff below was reversed, the *per curiam* opinion being as follows: "Hedges was injured while in the employ of the railway company, on November 23, 1889. The injury, as averred, resulted without fault on his part, from a defect in a brake he was then using in his employment, which was out of repair and defective by reason of the negligence of the company. Issues of fact were made up, and tried to a jury, which rendered a

conclusively the negligence of plaintiff in the control and management of his train.

The train in question was an extra, having no privileges in respect to regular trains which have the right of way. The rules provided that all trains must approach all stations, and water tanks between stations, under control, and so proceed until the track is plainly seen to be clear. The responsibility for a collision at a station, or at a water tank between stations, rests with the following or incoming train. Enginemen must exercise good judgment in stopping

verdict in his favor. Judgment was rendered on the verdict by the court, after overruling a motion for a new trial. On error the judgment was affirmed by the Circuit Court. The court charged the jury, among other things, to the effect that, if it found from the evidence that there was a defect in the brake that caused the injury, that fact raised a *prima facie* case against the company, and the plaintiff would be entitled to recover, if injured thereby without fault on his part. This, we think, was error. The instruction was predicated upon the provisions of a statute adopted April 2, 1890 (87 Ohio Laws, p. 149, sec. 2), which reads as follows: "It shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this State, brought by such employee, or his legal representatives, against any railroad corporation for damages on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation." The injury, as stated, occurred November 23, 1889, and was, therefore, an existing cause of action at the adoption of the amendment, though the suit was not commenced until afterwards, on May 21, 1890. Prior to this statute the existence of a defect in the machinery employed resulting in injury to an employee did not make a *prima facie* case of negligence against the company. Culpable knowledge on the part of the company had to be proved by the plaintiff. Assuming the act of 1890 to be remedial in character, still, under section 79, Rev. St., it would not apply to an existing cause of action without an express provision to that effect; and there is no such special provision in the act. It is true that section 79, Rev. St., applies only in terms to the amendment or repeal of a statute, and the act of 1890, above referred to, is neither. Still, we regard the principle of that section as declaratory of the policy of our law, which forbids giving to a statute retroactive effect, though remedial in character, unless the act contains an express provision to that effect. The judgment is, for the reason given, reversed."

Motorman injured in street car collision — Contributory negligence. — In GOODRICH *v.* CHIPPEWA VALLEY ELECTRIC R. R. CO. *(Wisconsin, December, 1900)*, 84 N. W. Rep. 419, an action to recover

and starting the train, keep a constant lookout on the track for danger signals and obstructions, must test the air brakes at least one mile before reaching railroad crossings, drawbridges, and before going down heavy grades and other hazardous places, and, in case they do not hold, must at once signal for brakes. Such test to be made by applying the brakes with sufficient force to ascertain whether they are working properly. Other requirements as to keeping in proper position fixed signals at stations and junctions do not relieve trainmen from observing all rules in regard to the protection of their trains. Again, enginemen are required to look back frequently while running to see that all is right, and observe whether watchmen and brakemen are at their posts, and report any neglect of duty; are required to understand the working of the air brakes and air signals, and to have in their possession a copy of the rules relating thereto. They must have a copy of the latest time-table, and a full set of signals; must examine the bulletin board in the engine house, and compare time with the conductor of the train before starting on each trip. Plaintiff was familiar with all of these rules.

According to the plaintiff's testimony, he was watching for the station; was within 1,200 or 1,400 feet from it when he first saw the red lights on the caboose of the standing train. He had been

damages for injuries to plaintiff, a motorman, sustained in a collision between street cars, judgment for defendant was affirmed. After stating the facts, the court (*per* WINSLOW, J.), said: "It appears by the complaint that the plaintiff was a motorman on the defendant's street car (presumably an adult in full possession of his faculties); that he was directed by the defendant to run his car across the track of a railway company without stopping, and assured that no accident was liable to occur thereby; that he did as directed, and was run into by cars being operated on the same railway track. There is no allegation that the steam-railway track was apparently unused, but it is alleged that the plaintiff did not know that it was frequently used. Upon these facts it is quite plain that the plaintiff cannot recover. The steam-railway track must have been in plain sight. It was itself a danger signal. McKinney *v.* Railway Co., 87 Wis. 282, 58 N. W. Rep. 386. It is just as much a signal of danger to the motorman of a street car as to the ordinary traveler. In crossing it without looking or listening, — as it must be necessarily inferred that he did from the statements of the complaint, — the plaintiff was plainly guilty of contributory negligence. The fact that he was ordered to cross without stopping, and assured that there was no liability of accident, is no excuse to an employee of full age and capacity, who can appreciate the danger as fully as his employer. Showalter *v.* Fairbank, Morse & Co., 88 Wis. 376, 60 N. W. Rep. 257. It is true that the complaint alleges that the brakes were defective, and the track improperly constructed, but neither of these facts appears by the complaint to have caused or contributed to the happening of the accident. Order affirmed."

watching for the mile board as he approached the station, but did not see it, for the reason that it was snowing and blowing. At the time he saw the red lights he was running about twenty-five miles an hour, and, after applying the air and reversing the engine, the speed was reduced to about sixteen miles an hour at the time his train collided with the standing train. He stated, on cross-examination, that he had run through several stations without applying the air brakes, and that in passing over a heavy grade he had made no application of the air to test them. The whistle was sounded at the mile post, although plaintiff did not recollect that he did it. He made no call for brakes as he approached Osseo. Says he did not remember of seeing switch lights. Although there was a curve in the track approaching the station, the view of the switch lights and station by the engineer as he approached was unobstructed for at least 2,000 feet. The undisputed evidence is to the effect that the switch lights were burning, and that one was located about 600 feet west from the station; also that the force of the collision was so great as to wreck the forward train.

The rules above mentioned are required for the purpose of placing the responsibility of the management of trains upon those who are directly in control. Such rules are absolutely necessary, are reasonable, and plaintiff was bound to control his train accordingly. The forward train was a regular freight train on schedule time, lawfully, under the rules, standing upon the track at Osseo. Plaintiff was bound to know that fact, and act accordingly. He could know it by consulting the time-table or schedule, which he had, or was bound to have, in his possession. He was bound to approach all stations with his train under control, and to know whether his train was under control by a proper testing of the brakes. He had failed to make such tests. The fact that the three rear cars were cut off from the air might not have been discovered by a mere application to see if the air work, but, if applied for the purpose of finding out whether the train was under control at the grade and at stations, he would have discovered to what extent his train was under control, and, if more time were required to stop the train by reason of the change in the brakes, the plaintiff would have found out the fact, and been prepared to act accordingly. The fact that it was dark and snowing only increased the necessity of more vigilance on his part. If plaintiff was not very familiar with the road over which he was running, its grades, stations, and danger points, it is no excuse for rushing blindly ahead. Under his orders and the rules, it was his business to make himself familiar, and to take the necessary

time to do so. We have taken plaintiff's own story, made all allowances, and can come to no other conclusion than that the plaintiff is himself responsible for his injuries; and, as this conclusion is reached from a consideration of his own theory of the accident and from his own personal statements, it follows that there is no probability of a different line of evidence or a different theory being evolved in good faith at another trial.

Order affirmed.

SCHNEIDER v. NORTHERN PACIFIC RAILWAY COMPANY.

Supreme Court, Minnesota, November, 1900.

PEDESTRIAN INJURED AT RAILROAD CROSSING — GATES — CONTRIBUTORY NEGLIGENCE. — 1. A pedestrian passing over a street at a city railway crossing is not relieved from the use of any of his faculties to discover danger, and it is his duty, if he is unable to hear warning signals, to use his eyesight, if that sense would disclose such danger; and a failure to do so must be held to display want of ordinary care on his part (1).

2. Neglect to take notice of an approaching engine on a steam railway track a person is about to cross, which could have been seen before going upon the same, cannot be excused by the failure of the railway company to comply with an ordinance requiring the maintenance of gates and a flagman at that place.

3. *Held*, upon the evidence, that the trial court properly directed a dismissal of the case upon the conclusion of plaintiff's testimony.

(Syllabus by the Court.)

1. For other actions relating to Accidents to Pedestrians at Crossings, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Among recent actions relating to Persons Injured While Crossing Tracks, are the following:

Pedestrian injured at crossing after alighting from train — Nonsuit. — In ABBOTT ET AL. *v.* DELAWARE, LACKAWANNA & WESTERN R. R. CO. *(New Jersey Err. and App., November, 1900)*, 47 Atl. Rep. 588, judgment of nonsuit was affirmed, the *per curiam* opinion stating the case as follows: "There was not, and cannot be, any claim that the evidence showed any negligence or breach of duty on the part of the defendant in the running of the train the engine of which struck and injured Mrs. Abbott. The sole contention is that there was evidence from which a jury might find that the defendant had not performed a duty which it owed to her in providing a safe mode of egress from its station, after she had alighted from its train, upon which she had been carried as passenger. An examination of the evidence clearly shows that no such breach of duty was established. By the platform provided by

APPEAL from District Court, Hennepin County.

Action by Martin Schneider, administrator of Martin Schneider, deceased, against the Northern Pacific Railway Company. Action dismissed. From an order denying a new trial, plaintiff appeals. *Affirmed.*

F. J. GEIST and M. C. BRADY, for appellant.

C. H. BUNN, L. T. CHAMBERLAIN, and JAMES B. KERR, for respondent.

LOVELY, J. — Plaintiff's intestate, Martin Schneider, while walking over defendant's tracks at a street crossing in Minneapolis, was struck by one of defendant's engines, and received such injuries therefrom that he died. His administrator brings this action to recover for the death of his intestate, upon the alleged neglect of defendant to maintain proper safeguards at the crossing, as well as for the negligent operation of the engine inflicting the injury. Three

the defendant, Mrs. Abbott could have proceeded in safety to Roseville avenue, a public street crossing the tracks of the defendant, by which street she intended to go to her place of residence. Had she availed herself of the mode of egress thus provided, she would have reached the public street in safety, and would then have found that the gates provided by the defendant to be shut when trains were approaching were in fact shut, and indicated that there was danger in crossing. Instead of doing so, she went upon the platform adjoining the main line of defendant's railroad at a point distant from the crossing at Roseville avenue. According to the evidence of some of her witnesses, she attempted to cross the tracks of the main line at that point, and was struck by the engine of a train running upon the track nearest to her. By her own evidence, she was not attempting to cross the tracks, but had taken a position so near the tracks that the engine struck her. She testified that she stood there for some time, watching another engine, standing upon the other track, to see when it would be safe to cross. Under these circumstances it is obvious that the defendant owed her no duty which it had not performed. It had provided a safe mode of egress from its station. There was nothing to indicate that it had permitted or invited her to cross at the point at which she had stationed herself."

Pedestrian attempting to cross between cars of train which blocked crossing — Assumption of risk. — In KRIWINSKI *v.* PENNSYLVANIA R. R. CO. *(New Jersey Supreme Court, November, 1900)*, 47 Atl. Rep. 447, there was judgment for defendant on demurrer to the declaration, GUMMERE, J., stating the case as follows: "The declaration contains three counts. The ground of action disclosed by the first two of them is that the defendants illegally blocked, with a train of their cars, one of the public streets of Jersey City; that the plaintiff, who was passing along said street, was stopped by the barrier made by the cars; that, after waiting for a period of fifteen minutes, he attempted to continue on his way by crossing over on the platform of one of these cars; that, while in the act of doing so, the defendants negligently, and without warning to him, started the train, thereby throwing him violently to the ground, and inflicting grave injuries upon him. No liability

railroad tracks cross Nineteenth street, running north and south parallel to East First street, to which they are adjacent. On the highway from Nineteenth street over First street going west there is an ordinary grade crossing, at which defendant was required by the ordinance of the city to maintain suitable gates, as well as a flagman to attend them, which ordinance had never been complied with. The day previous to the accident defendant had placed several box cars on the east track. These cars extended into Nineteenth street on either side, leaving a space of nine feet for passage of travelers. The distance between this track and the second track west was eight feet and ten inches, in the clear. The sides of the box cars referred to extended into this space twenty-three inches, so that the distance between the cars and the second track was six feet and eleven inches. After passing the box cars going west, a pedestrian would have an unobstructed view towards the south

on the part of the defendants to answer for the injuries to the plaintiff springs from these facts. The illegal obstruction of the public highway by the defendants was a nuisance, which it was the defendant's duty to abate with the utmost promptitude, by the removal of their cars. The longer they had neglected to do so, the more reprehensible their conduct would have been. Their action in removing their train from across the highway was therefore not only justifiable, but it was compulsory; and in doing so they were under no obligation to consider the plaintiff, or to regulate their action in reference to his safety, for they had no knowledge of his presence upon their car. The third count of the declaration sets out, in addition to the facts already stated, that the plaintiff was a passenger on the ferry of the defendant company running between New York and Jersey City, that the exit at the latter place was upon a public highway, that on the day of the happening of the accident the defendants had blocked this exit by placing across it a train of cars, and that the only way in which the plaintiff could get to the public street was by crossing over the platform between two of these cars. These additional facts do not change the situation, so far as the question of liability is concerned. The act of the defendants in thus blocking the entrance to their ferry was undoubtedly a wrongful one, but it was neither the direct nor the proximate cause of the plaintiff's injuries. Those injuries resulted from the rightful act of the defendants in removing the obstruction which they had placed in front of their ferry entrance, at a time when the plaintiff was, without their knowledge, attempting to pass between the cars. Another reason why there can be no recovery under the facts set out in the declaration is this: The obstruction of the public streets by the defendants' train was obviously only temporary. The train was liable to be moved off the crossing at any moment, and the plaintiff, in attempting to cross over between the cars, took the risk of danger from the starting up of the train while he was upon it, — particularly when he failed to give notice to the defendants of his presence there. The defendants are entitled to judgment on the demurrer." JOSEPH ANDERSON, appeared for plaintiff; VREDENBURGH & GARRETSON, for defendant.

within this space of at least three blocks. The deceased was an aged man, seventy-four years old, presumably of fair average intelligence, possessed of good eyesight and excellent hearing. It does not appear that he was familiar with the crossing, or that he had passed over it previously, although he had often used other crossings in the same vicinity, where there were gates and flagmen. On the occasion of the injury, which was in the daytime, he left First street to go west over that street through the opening between the box cars, and continued upon the highway until he reached the middle of the second track, where one of defendant's engines coming from the south ran upon him. He was thrown between the tracks, the engine stopping by the time it covered his body. It was then backed, he was picked up unconscious, and died soon after. The facts show also that there was a boiler shop in the locality, from which there issued considerable noise, that might easily have prevented the deceased from hearing the approaching engine. It does not appear that the engine bell was rung, although the whistle was sounded immediately previous to the collision, but for the purpose of this case it may be conceded that neither of these warnings would have been of avail. The facts above stated were conclusively established at the trial when plaintiff rested. The defendant then moved to dismiss the action, which motion was granted. Subsequently there was an order denying a new trial, from which the plaintiff appeals.

It is not an open question upon this appeal that defendant was negligent in its failure to maintain suitable gates and flagmen at the crossing as required by the city ordinance; but it is claimed, as a matter of law, that plaintiff's intestate could have readily discovered the approaching engine before going upon the track where he was struck, and is therefore precluded from recovering in this case. In support of this view it is urged that, after deceased had passed the obstructing box cars, his line of vision extended in the direction of the approaching engine a sufficient distance to have enabled him to have seen the same and avoided the collision, and we think the physical facts stated above must be held to establish this claim. After passing the box cars, a very slight movement of his head to the south would have disclosed the danger, and enabled deceased to have avoided the same; and it must follow either that deceased went forward without having looked in that direction, or that, having looked, he miscalculated the speed of the engine, and took dangerous chances in going ahead. Upon this situation it was held in an early case in this court that "a railroad crossing over a public highway upon the same grade is a place of danger, and is of itself a

warning to one about to go upon it to be careful and vigilant, to the extent of his opportunity, in the use of his eyes and ears, to discover an approaching train in time to avoid it; and when the vision of the traveler is so unobstructed along the track that he can easily discover an approaching train, or the circumstances are such that his sense of hearing, if used, must apprise him of the same fact in time to escape it, it will be presumed, under ordinary circumstances, in case of collision, that he did not look or listen, or, if so, that he heedlessly disregarded the knowledge thus obtained. In either of these cases, as a general rule, no action can be maintained." Brown *v.* Railway Co., 22 Minn. 167. It follows from this rule that it is not enough for the pedestrian approaching a railroad crossing, and having full control of his motions, to depend upon the evidence of one faculty alone; and, where circumstances interfere with the use of either sense of sight or hearing, the demand is imperative that he avail himself of the other. Deceased may have been excused in view of the noise, in not having listened; but his vision was unobstructed, and his inability to hear signals rendered it more essential for him to make the best use of his eyesight possible. The rule above stated has never been departed from in this court, but it has been applied and followed more recently in numerous cases, under which the plaintiff is clearly precluded from recovery by reason of the contributory negligence of his intestate. Carney *v.* Railway Co., 46 Minn. 220, 48 N. W. Rep. 912; Clark *v.* Railway Co., 47 Minn. 380, 50 N. W. Rep. 365; Studley *v.* Railway Co., 48 Minn. 249, 51 N. W. Rep. 115; Magner *v.* Truesdale, 53 Minn. 436, 55 N. W. Rep. 607; Judson *v.* Railway Co., 63 Minn. 248, 65 N. W. Rep. 447.

Plaintiff's counsel urges that this case may be distinguished from any of the cases above cited on the ground that deceased was an aged man; that the crossing was a city crossing; that under the rule in Hendrickson *v.* Railway Co., 49 Minn. 245, 51 N. W. Rep. 1044, 16 L. R. A. 261, every presumption is in favor of the exercise of due care by his intestate; and also that there was an implied invitation to cross the tracks, arising from the omission on the part of the defendant to maintain gates and a flagman at that place. In answer to these claims it may be said that the age of deceased did not relieve him from such care as he was able to exercise. It was conceded that his eyesight was good, and the fact that this was a city crossing, where the danger was greater on account of the increased number of trains passing over the tracks, was a fact which should have induced even greater caution on that account. It may well be admitted that every presumption is to be extended to the

conduct of the deceased which the circumstances proved will permit, but beyond this courts cannot go, and imagine other circumstances to relieve plaintiff's intestate of the burden of that care which was required of him. The most that can be said in the application of this rule, under the evidence in this case, is that deceased was relieved from the duty of listening, on account of the noise, and also that he did look to the south as he went upon the second track, and thought that he might pass over the same in safety. We can see no other inference that can be given to his actions in this respect that would be consistent with the evidence, and, giving him the benefit of this presumption, it does not excuse him. If we presume that he saw the engine, and went in front of it knowingly, it was a hazard he should not have taken, and clearly indicates a want of proper care.

Upon the claim that plaintiff's intestate had a right to presume that the ordinance of the city had been complied with, and that the absence of the flagman and gates may have misled him, and amounted to an indication to him that he might cross the railway tracks in safety, it may be said that had there been gates which were open, or had a flagman been present, there would be considerable force to this contention; but the absence of either was apparent, and a plain notification of that omission to deceased, as well as a requirement that he must exercise ordinary care under the conditions then existing. The failure on the part of the railroad company to comply with the law in the respects stated does not excuse an injured party from using his sense of sight or hearing upon approaching a railway crossing, when the due use of either sense would have enabled the injured party to escape the danger. Beach, Contrib. Neg., sec. 185.

Order affirmed.

NEVILLE v. ST. LOUIS MERCHANTS' BRIDGE TERMINAL RAILWAY COMPANY.

Supreme Court, Missouri, Division No. 1, November, 1900.

PERSON ASSISTING IN SHIPMENT OF CATTLE KILLED WHILE PASSING FROM ONE CAR TO ANOTHER—CONTRIBUTORY NEGLIGENCE. — In an action to recover damages for the death of plaintiff's intestate, a boy sixteen years old, who was assisting in the shipment of cattle, it appeared that deceased was riding with his employer and drover in a caboose attached to the train until they reached the railroad terminus

when the caboose was detached and the cattle cars turned over to defendant to be carried to certain stock yards. There being no other place for the party to ride, they got on top of the freight cars. When the cars arrived near the stock yards the train slowed up, and the conductor got off to see the agent in his office. The conductor then started the train up, and the deceased fell off while moving from one car to another. There was no unusual jolting and the train was running smoothly and slowly when the accident occurred. *Held*, that plaintiff's intestate assumed the risks incident to the attempt to step from one car to the other while the train was in motion, that being the proximate cause of the accident, and plaintiff could not recover (1).

APPEAL from St. Louis Circuit Court.

Action by William C. Neville, for the benefit of the next of kin of Eugene Neville, deceased, against the St. Louis Merchants' Bridge Terminal Railway Company, to recover for the death of deceased. From a judgment for plaintiff, defendant appeals. *Judgment reversed.*

"This is an action for damages for personal injuries, resulting in death, to Eugene Neville, a minor, sixteen years old, at the National Stock Yards, in East St. Louis, Ill. The suit is brought by the father of the deceasd for the benefit of the next of kin. The Illinois statutes create a liability whenever the death of a person is caused by the wrongful act, neglect, or default of another in all cases where the party injured might sue if the injury had not resulted in death, and permit the action to be maintained in the name of the personal representative of the deceased for the exclusive benefit of the widow and next of kin of the deceased. Sections 1, 2, c. 70, Rev. St. Ill. The laws of Missouri (Acts 1891, p. 68) provide that whenever any cause of action has accrued by virtue of the laws of any other State, and the person entitled to maintain such action in such other State is not entitled to maintain the action under the laws of this State, the court shall appoint a person to maintain the action for the benefit of the persons entitled to the proceeds under the laws of such other State. Accordingly the Circuit Court appointed the father of the deceased to maintain this action for the benefit of the father, brothers, and sisters of the deceased, the

1. For other actions similar to the case at bar, or of Injuries to Persons Getting off Trains in Motion, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

For actions relating to Alighting from and Boarding Trains, Street Cars, etc., from the earliest period to 1897, see vols. 2–7 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topics, from 1897 to date, are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

mother being dead. The petition charges three acts of negligence and wrongful conduct: First, failure to provide a caboose car to its freight train on which deceased was a passenger; second, forcing the deceased to take a position of great danger, to wit, to ride on the top of the freight cars; and, third, so carelessly and negligently managing and running its train that, by careless and negligent jolting of the cars, the deceased was thrown from the top of the cars, and run over, and injured so that he died. The answer is a general denial and plea of contributory negligence."

The trial developed these facts:

"The deceased, Eugene Neville, was a minor, not quite seventeen years of age. On October 16, 1895, Sayers Bros. & Hayes shipped ten cars, loaded with cattle, from Adair, Indian Territory, to St. Louis, over the Missouri, Kansas & Texas Railroad. Neville accompanied W. T. Sayers and his drover, W. H. Cain, to assist in looking after the cattle. They rode in a caboose, attached to the train, until they reached the terminus of the Missouri, Kansas & Texas Railroad in North St. Louis. There the caboose was detached from the train, and the cars containing the cattle were turned over to the defendant, to be carried, with ten other cars, to the National Stock Yards, in East St. Louis, Ill. Some one, it does not appear who, or, if so, by what authority he acted, told them to get on the top of the freight cars; but Sayers and Cain got on the top of the cars, and the deceased followed them. There was no other place provided for them to ride. When the train reached the National Stock Yards the engineer shut off the steam, and the train ran by its momentum, very smoothly and slowly, not half as fast as a man could walk. Cain got down off the train, while Sayers and Neville remained on the top of the cars. The conductor went into the office, and exhibited his waybills to the agent, and was told by him to set his first car at chute 18. What then occurred is best told by the testimony of the several witnesses."

[The testimony is omitted here.]

"Under instructions hereinafter referred to, the jury returned a verdict for the plaintiff for $3,000, and defendant perfected its appeal."

JNO. H. OVERALL, for appellant.

J. B. BURKHALTER and NOBLE & SHIELDS, for respondent.

MARSHALL, J. (after stating the facts). — 1. At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence, and the court overruled the same. This is the first error assigned. The failure of the defendant to furnish a caboose for the deceased to ride in was eliminated from

the case by the Circuit Court, the plaintiff submitted to that ruling, and it is not open to review on this appeal. The theory upon which the plaintiff predicates a right to recover is that the train had stopped before the deceased started to get off, and that the deceased had a right then to get off, but that before he could do so, and while in the act of doing so, the train was started forward with a jerk, and without any notice or signal of intention to start, in consequence of which the deceased was thrown off, and injured so he died. This theory could only apply to the third act of negligence alleged in the petition; that is, that the defendant managed and ran its train so carelessly that, by reason of the careless and negligent jolting of the cars, the deceased was thrown from the train. The instructions asked by the plaintiff, and given by the court, follow the lines of the petition. From a reading of the petition it could not fairly be said that the pleader intended to charge the defendant with negligence in starting its train, without notice or signal, and with a jerk, in consequence of which the injury occurred. The petition rather conveys the impression that the pleader meant to charge that the jolting occurred while the train was in motion, and that the deceased was thrown off of the cars — not while attempting to get off, but evidently and solely by reason of the jolting. The theory of the plaintiff in this court, therefore, does not appear from the petition or instructions to be the theory upon which this case was tried in the Circuit Court. Being thrown off of a train while in motion by the jolting and jerking of the train is a different case from being thrown off a train which has stopped, and from which the person is alighting, by reason of the sudden starting of the train without a signal and with a jerk. This difference is illustrated by the cases of Dougherty *v.* Railroad Co., 81 Mo., loc. cit. 330; Swigert *v.* Railroad, 75 Mo., loc. cit. 481; Straus *v.* Railroad Co., 75 Mo. 185; Bartley *v.* Railroad Co., 148 Mo. 124, 49 S. W. Rep. 840; Railroad Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898 (1).

The testimony bearing upon the question whether the train was stopped, and then started without a signal and with a jerk, while the deceased was in the act of alighting, is given by plaintiffs' witnesses as follows: Howard says, to the best of his remembrance and knowledge, "it came to a standstill and started again," but it was moving slowly when he got off, and when he went into the office,

1. See these cases cited: Dougherty *v.* Mo. Pac. R. R. Co., 81 Mo. 325, 4 Am. Neg. Cas. 532; Swigert *v.* Hann. & St. J. R. R. Co., 75 Mo. 475. 4 Am. Neg. Cas. 523; Straus *v.* Kan. City, St. J. & C. B. R. R. Co., 75 Mo. 185, and 86 Mo. 421, 4 Am. Neg. Cas. 517 and 552; Ind. & St. L. R. R. Co. *v.* Horst, 93 U. S. 291, 7 Am. Neg. Cas. 331.

and he did not see the accident, and therefore could not swear how the deceased was hurt. He heard Cain ask deceased, after he was taken into the office, how he got hurt, and "he said it just shook him off." Martindale, the receiving clerk in the office, said he could not swear that the train had stopped before the conductor came into the office, but that it did come to a full stop before he told him to go ahead; that "I did not see the train lurch ahead; I heard it — that was all." But, as he did not see the accident, he did not know whether the accident occurred before or after the train stopped and then started again; that "I asked him [deceased] how he got hurt, and he told me that he got up and walked down towards the little house or shanty, and as he went to step from one car to the other the train moved ahead and he fell between the cars." Cullen said the train stopped, the conductor went into the office, the clerk told him to pull up to chute 18, the conductor came out of the office, and started the train up, and then the accident occurred. Bales testified that the train stopped and then started, but he could not swear whether he heard the report of the accident before or after the train started again. He did not see the accident. Ford testified that "the train checked up and slacked ahead again," and afterwards he heard the boy was hurt. He did not see the accident. Hardin, who rode over the river on top of the train, got off the train at the office of the stock yards, while the train was moving slowly, and went into the office. Did not know whether the train came to a standstill or not. "Heard a noise like it stopped, but could not say it stopped. The noise was like that of drawheads coming together and pulling apart; 'pulling up slack,' I believe they call it. I heard that after I was in the house. Did not know whether or not it was before or after I heard Neville was hurt." He did not see the accident. Sayers was the only eyewitness to the accident, and he said the train was running smoothly and slowly when the accident occurred, and had not stopped, but did stop in a very short space after the accident; that Neville was in the act of getting down from the train when he fell; that "he walked off of the front part of the car in the direction the train was going, and was picked up near the rear end of the car he fell from." Defendant's witnesses testified as follows: Charles McCaffrey, the conductor, said the train did not stop until it reached chute 18, and then a man told him "a young man behind was being hurt;" that "there was no motion after it stopped the first time." Bissett, the engineer, said the train was running very slowly when it reached the office, with only enough steam on to get across the switches; that there was no jar to the train; and that the train did not stop until it

reached the chute. Collins, the fireman, who was also an engineer, said the steam was shut off about at the office, and the train ran by its momentum to chute 18, which was a distance of four or five car lengths; that the train did not stop until it reached the chute. Silverthorn, the defendant's head switchman, said that at the time the conductor got off of the train it was running so slowly that there was no danger to any one in getting off; that a two year old child could get off without being hurt; that the train had to move slowly, because of the number of switches there; that the train did not stop until it reached chute 18; that there was no jerking or jolting to the train. Ratchford, the rear brakeman and switchman on the train, said the train was moving very slowly and easily, with no jerking or jolting; that it never stopped until it got to the chute.

Thus it appears that Howard, Martindale, Cullen, and Bales said the train stopped and then started again, and went on to the chute, some 140 to 160 feet further, but none of these persons saw the accident, or say whether the accident occurred before or after the train stopped, or whether it was the stopping and starting of the train suddenly, and without any signal, that threw the deceased off the car. Hardin says he heard a noise like that of drawheads coming together and pulling apart — "taking up slack" — but did not know whether this was before or after the accident. The deceased himself said, "as he went to step from one car to the other, the train moved ahead, and he fell between the cars;" and, again, that "it just shook him off." Sayers, the only eyewitness, said the train did not stop, but was moving slowly, when the deceased "simply walked off;" "was in the act of getting down from the train," and fell; "walked off the front part of the car in the direction the train was going, and was picked up near the rear end of the car he fell from." On the other hand, McCaffrey, Bissett, Collins, Silverthorn, Ratchford, and Ford said the train did not stop until it reached the chute. Every witness testified that the train was running slowly, and was well and properly managed. All of the witnesses, except Hardin, say there was no jerk or jolt or jar, and Hardin only says that after he got inside of the office he heard "a noise like that of drawheads coming together and pulling apart — pulling up slack;" but even he does not say this occurred before the accident or was the cause of the accident.

The result is: Four witnesses swear the train stopped and started again: one heard a noise which indicated that it stopped and then started again; but none of the five saw the accident, or could say that this occurred before or after the accident, or was the cause of the accident. The only eyewitness says the train did not stop

before the accident; that the deceased simply walked off, or while in the act of getting off fell; and the deceased himself said that as he went to step from one car to another the train moved ahead, and he fell between the cars; and, again, that "it just shook him off." Six witnesses say the train did not stop until it reached the chute, and was not started after it stopped until it was cut in two to get the deceased from under the car. There is therefore a conflict in the testimony as to whether the train stopped and started again before it was finally stopped at the chute. There is no evidence, except Hardin's, which does not rise to the dignity of establishing the fact, that there was any unusual or unnecessary jerk or jar or jolt in stopping or starting the train, if such was done. The only evidence connecting the injury with the movement of the train is that of Sayers and of the deceased. If Sayers' testimony is true, the deceased simply walked off the train, or fell off while in the act of getting off, while the train was in motion. If the statements of the deceased are true, as he went to step from one car to another, the train moved ahead, and he fell between the cars, or "it just shook him off."

It is simply incredible that a sixteen-year-old lad would simply walk off of the top of a freight car. It is more likely that he was in the act of getting off, and fell, or, as the deceased said, he attempted to step from one car to another and fell between them. The evidence of Sayers is the only evidence in the case that the deceased was in the act of getting off, and he says the train was moving very slowly, and, if this be taken as true, the plaintiff has no case; for he took the risk of getting off of a moving train without the direction or invitation of the defendant or its servants. The whole case for the plaintiff, therefore, rests upon the probative force of the statements of the deceased. His statement that the train moved ahead as he attempted to step from one car to another contemplates the idea that when he began the attempt the train was at a standstill, and that before he completed the attempt the train moved forward, and he fell between the cars or was shaken off. The cases hereinbefore cited establish the rule that a train must stop long enough to reasonably enable a passenger to alight, and the plaintiff invokes this rule in this court, though such an idea would scarcely have been gotten from the averments of the petition. But this rule is not broad enough to warrant a recovery in this case; for, giving the fullest force to the statements of the deceased, they do not show that he was either in the act of alighting from the train, it being at rest (for he would take the risk of alighting if the train was in motion), or that he intended getting off. On the contrary,

his act and statement clearly show he was not attempting to alight, but, on the contrary, he was attempting to step from one car to another. In order to alight, it was not necessary for him to do this. If this was what he was doing and attempting to do, then the rule invoked by the plaintiff has no application to this case, and the plaintiff is not entitled to recover, for there is no rule of law which would subject the defendant to liability if the deceased, without any known or good reason, attempted to step from one car to another, and fell between them, whether the cars were moving or at rest when the attempt began, and were moved, without a signal, before the attempt was completed. As before pointed out, the train was well operated, and was running smoothly and slowly, and there were no unusual or extraordinary jerks or lurches or jolts or jars, and unless there was the plaintiff is not entitled to recover if the jolt or jerk occurred while the train was in motion, as a necessary or unavoidable incident to the operation of the road. Bartley *v.* Railroad Co., 148 Mo. 124, 49 S. W. Rep. 840.

The plaintiff relies strongly upon the case of Railroad Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898 (1). The facts in that case were these: The plaintiff, a stockman, rode in the caboose car, attached to a cattle train. When the train reached Mattoon, Ill., the caboose was detached from the train, and the plaintiff was forced to get on top of the freight car. The train then ran a half to three-quarters of a mile to pass onto a switch to take another caboose. "A brakeman on the hindmost car had a lantern in his hand. The light so dazed or blinded the plaintiff that he thought he was on the same car with the brakeman, though he was in fact near the end of the car next before it. The train, in backing on the switch, stopped before it reached the caboose which was to be attached to it. It was thereupon suddenly drawn forward to take up the slack, and then suddenly backed, producing a quick and powerful concussion, which precipitated the plaintiff between the car on which he was standing and the hindmost car." It is apparent that this case is very essentially different from the case at bar. There was no pretense in that case that the plaintiff was attempting to alight from the train, and was thrown from the train by the starting thereof without notice or signal, before he had, reasonably, time to get off. There was abundant evidence in that case of an unusual, unnecessary, and extraordinary jolt, which brings that case clearly within the rules announced in Bartley *v.* Railroad Co., *supra.* But no such conditions are present in this case, but the facts and theories are quite the reverse. Hence we subscribe, as was done in the Bartley

1. Reported in 7 Am. Neg. Cas. 331.

Case, to the doctrine of that case, but cannot apply it to the facts in this case.

There is no theory, upon the facts proved, which would justify a verdict for the plaintiff. The evidence does not justify a verdict upon the theory that the train was at rest, and the plaintiff attempted to leave it, and, before he had time to do so, the train was started without a signal, and the plaintiff was thrown off and hurt. Neither is there any substantial evidence that the defendant was guilty of any negligence in the operation of the train, nor that there was any unusual, unnecessary, or extraordinary jolt or jar or jerk, but, on the contrary, the evidence is practically uncontradicted that no such thing occurred, but that the train was running slowly and smoothly. It is clear that deceased attempted to step from one car to another while the train was in motion, or when the train was at rest, and that the train started without notice while he was in the act of so doing (it is immaterial which is the fact), and that he fell between the cars and was hurt. This is, without doubt, the proximate cause of the injury in this case. The mere being on the top of the car did not cause the accident. If he had not tried to step from one car to another, there is absolutely nothing in this record to cause a suspicion that he would have been hurt. There is no reason or excuse shown for his stepping from one car to the other. He took the risks incident to the act, and the plaintiff cannot recover.

Inasmuch as no verdict in favor of the plaintiff could be allowed to stand in this case, the judgment is simply reversed. Haven *v.* Railroad Co. (Mo. Sup.), 55 S. W. Rep., loc. cit. 1039. All concur.

SWIFT & CO. v. HOLOUBEK (1).

Supreme Court, Nebraska, November, 1900.

EMPLOYEE INJURED BY MACHINERY — INSTRUCTIONS — DANGEROUS PREMISES. — 1. In an action for negligence by reason of alleged defective machinery, whereby plaintiff, who was assisting in the operation of such machinery, received injuries resulting in the loss of three fingers and a part of the left hand, *held*, that the evidence of negligence was sufficient to support the verdict of the jury.

2. *Held*, also, the evidence being contradictory as to whether the machinery, and especially the part alleged to be defective, was in all respects similar and the same as like classes of machinery in common and ordinary use,

1. See former decision in this case, reported in 4 AM. NEG REP. 509, where judgment for plaintiff for $5,000 was reversed for erroneous instructions.

that the question of negligence was not one of law, but of fact, properly within the province of the jury to determine.

3. As to whether the verdict is so large as to make it apparent that it was rendered under the influence of passion and prejudice is not determined.
4. The refusal to give instruction requested copied in the opinion *held* not to be erroneous.
5. The giving of two instructions copied in the opinion *held* to be erroneous.
6. Negligence will not be presumed in the absence of facts and circumstances from which its existence may reasonably be inferred. The presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by evidence. Spears *v.* Railroad Co., 43 Neb. 720, 62 N. W. Rep. 68.
7. Where, in an action by an employee against an employer, one of the causes contributing to the injury for which recovery is sought in damages being the alleged negligent action of the employer in permitting the floor where plaintiff stood to become wet and slippery, a finding in favor of the plaintiff as to such act of negligence can only be had when it affirmatively appears by proof that the employer has failed in the exercise of reasonable care in providing the employee a reasonably safe place in the prosecution of the work required.
8. Instructions to a jury are required to be applicable to the evidence, and grounded upon the pleadings in a case.
9. When instructions assume the possible existence of a material fact, to support which there is no evidence. — as where a question is submitted as to the alleged negligence of a defendant by reason of the wet and slippery condition of the floor where the plaintiff stood while operating a machine, by which an injury was received, — and authorize a recovery if the jury find the defendant negligent in respect to the condition of the floor, there being no evidence tending to prove that such condition was an act of negligence, the giving of such instruction is erroneous.

(Syllabus by the Court.)

ERROR to District Court, Douglas County.

Action by Frank Holoubek against Swift & Co. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

I. R. ANDREWS and BROME & BURNETT, for plaintiff in error.

J. L. KALEY, for defendant in error.

HOLCOMB, J. — In an action for negligence defendant in error (plaintiff below) recovered a verdict and judgment for the sum of $11,500, for the reversal of which these proceedings in error were instituted. The case has once prior been before this court, and reversed for errors in instructions given to the jury, the opinion being found in Swift & Co. *v.* Holoubek, 55 Neb. 228, 4 Am. Neg. Rep. 509, 75 N. W. Rep. 584. The defendant (plaintiff in error) is a corporation engaged in the dressed-meat business, and has in operation in South Omaha an establishment commonly known as a "packing house." The plaintiff, at the time of the transactions pleaded in the petition, a boy between fourteen and fifteen years of

age, was in the employ of the defendant. At the time of the injury complained of, and for only a short time previous thereto, he was, with others, engaged in operating a machine for cleaning hog casings or entrails. He had never worked with the machinery before, and, after being instructed by those with whom he was working, he assisted in the operation of the machinery, and while thus at work he seems to have slipped in such a manner as to throw him towards the machine, causing him to thrust his hand under a shield, and into some rapidly revolving knives or scrapers, causing the injury which is made the basis of this action. It is alleged, in substance, that the plaintiff was injured by having three fingers and a part of the left hand cut off and destroyed by revolving knives or scrapers in a hog casing cleaning machine, in the operation of which he was assisting in the cleaning of hog casings; that the machine was defective, dangerous, and unfit for use, more especially in that the space between the shield covering the revolving knives or scrapers and the drum of said machine was greater than it should have been if properly constructed and attached to the machinery, thereby allowing plaintiff's hand to be drawn into and under said shield, and come in contact with said revolving knives, causing the injury as aforesaid; that, if the shield had been properly constructed, and attached to the machinery, the space between it and the drum of the machine would not have exceeded one eighth to one-fourth inch, when in truth and in fact the space was an inch or over. It is also alleged that the defendant was negligent in permitting the floor about the machine where plaintiff stood, while assisting in its operation, to become wet, greasy, and slippery, and negligently and carelessly failed to provide and use, or cause to be used, salt or other suitable substance for sprinkling over the floor where plaintiff stood, by reason of which plaintiff slipped, and fell forward, thus contributing to the injury as aforesaid. The answer denied that the machinery was defective, or improperly constructed, or that defendant was guilty of negligence in that respect. As to the allegation of negligence in regard to the condition of the floor, it admitted that the floor was wet and slippery at the time of the accident, but alleged that such was the common and ordinary condition of the floor at all times while the machine was in operation, and that such condition was a necessary consequence to the operation of the machine, and that it could not be operated without the floor becoming wet and slippery; that the plaintiff knew, when he commenced the work, of the condition of the floor, and knew that it was the usual and ordinary condition while the machine was in operation.

It is urged that the evidence fails to establish negligence on the part of the defendant, or a reasonable inference of negligence, and for that reason the verdict and judgment cannot be sustained; and that error was committed by the trial court in not instructing the jury peremptorily, as requested by the defendant, to return a verdict in its favor. To this we cannot assent. An examination of the evidence convinces us that it was sufficient, not only to justify, but to require the submission of the question to the jury as to the alleged negligence of the defendant with regard to the machinery alleged to be defective and improperly constructed, by reason of which the plaintiff suffered the injury. Without an attempt at reference to the evidence in detail on this point, we deem it sufficient to say that, with respect to the manner of the construction, arrangement, and attachment of the shield covering the revolving knives or scrapers in the machine used for cleaning the casings, the whole record is pregnant with evidence in support of the issues raised by the pleadings with respect to such matter. The theory of plaintiff's case rested upon the proposition that the shield was improperly and negligently constructed, and was attached to the machinery in such a manner as to make the space between the knives and the revolving drum an inch or over, and sufficient to permit the hand to pass into the rapidly revolving knives; when the proper construction would have allowed but an eighth to a quarter of an inch space, and thus prevent the possibility of the happening of an injury similar to that suffered by the plaintiff. Evidence was offered in support of his contention in this regard. On the contrary, the defendant maintained that the shield was properly constructed and attached, and that it was only about one-eighth to one-fourth of an inch from the drum; thus, in effect, conceding that a proper construction would leave a space only of the distance last mentioned. The evidence shows that in the operation of the machine the casings were placed on a slowly revolving drum, and passed under the rapidly revolving knives or scrapers for the purpose of scraping or cleaning them, and that in the performance of the work it was the duty of one of the operators — in this instance the plaintiff — to take hold of the casings near to the shield covering the revolving knives, conduct them between two revolving rollers which pressed them in the manner of a clothes wringer, after which they dropped into a receptacle beneath. The motion of the drum was towards the plaintiff, and, as to where he stood, away from the revolving knives. In performing this work it appears to have been usual for the operator to allow the left hand to rest on the drum near the revolving knives for partial support, and with the right

hand manipulate the casings in the manner described. The shield was evidently for the purpose of protecting the operators of the machine from contact with the revolving knives, and, under plaintiff's theory, should be placed so near the drum as not to permit the hand to slip thereunder, and against the knives or scrapers. A great deal of the evidence was directed to and centered in the one proposition as to the proper and natural construction of the shield, and whether the one in controversy was thus constructed. The verdict of the jury cannot be said to be unsupported by the evidence. It is also urged that as a matter of law, under the undisputed evidence, the verdict cannot be sustained, because no negligence is shown. This contention is based on the assumption that the machinery, and especially the shield, was in all respects the same and similar to the same class of machines in common and ordinary use, and therefore in the use thereof negligence cannot be imputed to the defendant. We observe a sharp conflict in the evidence as to whether the shield, which it is claimed was defective, and improperly attached, was the one forming a part of the machine as originally manufactured and constructed. Certainly, there is evidence to show that it was not usual or customary to construct machines in the manner it is claimed the one in controversy was constructed. There is evidence to support the conclusion that a change in the manner of the original construction and attachment of the alleged defective machinery had occurred, if not the substitution of an entirely different article than the one manufactured with the machine. The issue we regard as purely one of fact, and upon which there is a conflict of the evidence, rendering the question one properly in the province of the jury for its determination.

It is also contended that the verdict of the jury is excessive, as a result of passion and prejudice, and for that reason should not be permitted to stand. We may say, with respect to this matter, that the verdict appears rather large when considered in connection with the nature and extent of the injury. It appears somewhat larger than verdicts generally returned and upheld when an injury has been received of an extent and degree equal to, or even greater than, that in the case at bar. Whether it is so excessive as to make it apparent that it was the result of passion and prejudice we will not here determine. We only say that defendant's contention is worthy of serious consideration. In the examination of briefs of counsel, we have noticed a slight manifestation of feeling towards counsel, litigants, and witnesses on the opposite side of the controversy, and, if the same spirit prevailed in the heat of a stubbornly contested trial, we can conceive of how the prejudices of a jury may

possibly have been excited, and their passions aroused to such a degree as to preclude the cool, calm, and deliberate judgment which ought to be characteristic of all judicial proceedings.

The rulings of the court in the giving and refusing of several instructions are complained of, some of which only will be noticed. One instruction requested by the defendant, and refused, is as follows: "You are instructed as a matter of law that an employee assumes the risks and dangers incident to his employment that are open, obvious, and apparent, and respecting which he has the same knowledge and opportunity to observe possessed by the master; and in this case you are instructed that respecting the condition of the floor and the presence of water thereon at the place where the plaintiff stood at the time the alleged injury was received the danger of slipping, if you find there was such danger, was obvious and apparent, and plaintiff assumed the risk incident to such condition; and if you find, from the evidence in this case, that the injuries of which plaintiff complains were received by him by reason of slipping upon the floor, and further find that, if plaintiff had not slipped, he would not have been injured, then you are instructed that for such injuries defendant is not liable in this case, and your verdict should be for the defendant." Error is sought to be predicated on the court's ruling regarding the instruction refused, as well as on instructions given referring to the same matter, which, when taken together, are especially urged as erroneous. Two instructions were given bearing upon the question of negligence with reference to the condition of the floor, which, omitting such as refer to the alleged defective machinery, are as follows: "The burden of proof is upon the plaintiff in this case to establish by a preponderance of the evidence the material allegations in his petition which are denied in the defendant's answer; that is, that the defendant * * * negligently permitted the floor on which plaintiff stood when operating the machine to be slippery, as alleged, whereby plaintiff, without any negligence on his part, was injured, and the extent of the injury and the damages caused thereby." And also instruction No. 11: "It is the duty of every master to conduct his business with reasonable care and prudence, so as not to negligently or carelessly subject his servants to any danger not ordinarily incident or connected with his employment; and it is the duty of the master to provide his servant with a reasonably safe working place, * * * and, if the master fails in this regard, — that is, fails to exercise such reasonable care and prudence in the conduct of his business, — and fails to provide his servant with a reasonably safe working place, * * * and the servant is injured thereby and for such reason, then the master

is liable in damages for such injuries, unless negligence or want of ordinary care of the plaintiff contributed to his injury." The fault of the instructions given, it is urged, lies in the fact that they submitted to the jury as an issue of fact the wet and slippery condition of the floor, which was admitted, and permitted an inference of negligence by reason thereof, and without any evidence to support the same. Having admitted the wet and slippery condition of the floor, the defendant denied that it was negligently permitted to be so, and alleged that the same was its ordinary and natural condition, and made necessary in the operation of the cleaning machine. In effect the defendant's position was that the condition of the floor was open, obvious, and notorious, rendered necessary in the conduct of the business, and was one of the risks incident to the employment, and assumed by the servant. It will be observed that, whatever the issue of fact as to negligence with respect to the condition of the floor, it was whether it was the usual, natural, and ordinary one, and reasonably necessary to the operation of the machinery in the conduct of that branch of defendant's business.

In the petition it was averred, in addition to the alleged negligence regarding the slippery condition of the floor, that the defendant had carelessly and negligently failed to provide salt or other suitable substance to prevent a person from slipping. No evidence was introduced tending to prove that it was usual or common to use such material in the conduct and operation of a business or work similar to that in which plaintiff was engaged when injured. At the request of defendant an instruction was given withdrawing from the jury the question of negligence in regard to the failure of defendant to use salt or other suitable substance to prevent a person from slipping while operating the machine. The issue, however, as to the alleged negligence of the defendant in regard to the condition of the floor, was submitted to the jury in the instructions heretofore quoted, and from them, whether properly or improperly, they were permitted to infer negligence on the part of defendant because the floor where plaintiff stood was wet and slippery. If it was error to submit to the jury, as an issue of fact, the question of defendant's alleged negligence in regard to the wet and slippery condition of the floor upon which plaintiff stood while operating the machine, it is quite clear that the error was not cured by the giving of a correct instruction as to the alleged defective machinery, or the instruction withdrawing from the jury the question of defendant's alleged negligence by reason of its failure to place salt or other suitable substance on the floor to prevent slipping. Richardson *v.* Halstead, 44 Neb. 606, 62 N. W. Rep. 1077; Carson *v.* Stevens, 40 Neb. 112,

58 N. W. Rep. 845; Bank *v.* Lowrey, 36 Neb. 290, 54 N. W. Rep. 568. The jury, from the instructions given, were yet at liberty to find negligence in defendant by reason of the wet and slippery condition of the floor.

We do not think it was erroneous to refuse the instruction requested on this particular phase of the controversy. By it was excluded the idea of recovery by reason of the alleged defective machinery, which, if plaintiff's contention were true, was the direct and immediate cause of the injury, even though the initial and moving cause may have been the slipping of plaintiff while standing where he was. The fact of plaintiff's slipping, although no negligence was established on the part of the plaintiff with respect to the condition of the floor, would not preclude a recovery if it be found that the machinery was improperly and imperfectly constructed and attached, by reason of which plaintiff's hand was permitted to pass under the shield and upon the revolving knives, and thereby receive the injury, and that such defective and faulty machinery caused the injury or contributed thereto. The error lies, we think, rather in the instructions given than in the one refused. There is no evidence from which an inference of negligence may arise because of the slippery condition of the floor. All the evidence bearing upon the point is uncontradictory, and shows beyond controversy that such was the usual, common, ordinary, and necessary condition in the operation of the machine in cleaning hog casings, for which it was used. In doing the work necessary to accomplish the desired object much water was used, which was thrown under pressure on the casings, as from a sprinkler, and necessarily fell upon the floor, where it was permitted to collect in a gutter, and pass off as waste. It is difficult to conceive of a different condition in the prosecution of such work in a large packing establishment, where much of the business is carried on by machinery, and the material handled in large quantities, as must necessarily be the case in establishments of the magnitude of defendant's and others situated in South Omaha. We know of no rule by which the jury may infer negligence from the mere fact of the slippery condition of the floor, as in this case, without other evidence to support such inference. It is probably true that circumstances may be such as to require the defendant, in the discharge of its duty as employer, to provide a reasonably safe place for its workmen in the prosecution of their labors, for the failure of which actionable negligence would be chargeable to it. But in this case there is no evidence to support such a conclusion. The plaintiff, realizing the requirements of the law in this regard, sought to establish negligence by pleading that defendant failed to provide

salt or other suitable substance to prevent slipping, but, failing to furnish any testimony in support thereof, was compelled to abandon that issue in the case. Counsel for plaintiff contends that defendant, in its answer, admitted the allegations of the plaintiff that the floor was wet, greasy, and slippery, and that it was negligently permitted to be so by the defendant, and argues that it was the duty of defendant to provide a platform or other device to prevent slipping, and therefore is unable to see why the jury might not so find. The argument does not commend itself, for two reasons: First, it is not admitted that the slippery condition of the floor was an act of negligence, — on the contrary, this is denied; and, second, with the same degree of merit it could be urged that duty required defendant to scatter salt or other substance to prevent slipping as that it should be required to provide a platform or other device for the same purpose; and it is conceded by all that, under the evidence, not only was it proper, but it became necessary, to withdraw from the jury's consideration any question of negligence regarding the failure to use salt or other suitable substance. The same reason which prohibited the submission of one question existed as to the other. If duty required the use of a platform or other device to prevent slipping, then, in the absence thereof, it required the use of salt or other suitable substance for the same purpose. The reason for the obligation, if existing, applies alike to all the different methods by which the object may be accomplished. There was not only an utter lack of evidence tending to prove that it was usual or customary in such cases to throw salt or other substance on the floor to prevent slipping, but it is equally clear that there is nothing in the evidence from which the inference may be drawn that it is common, customary, or usual in the prosecution of work of the character under consideration, in like establishments, that platforms or other devices are used as a precaution against slipping, that, as a reasonable precaution, for the safety of the employees, it could be regarded as the duty of the master to make some such provisions. Negligence will not be presumed in the absence of facts or circumstances from which its existence may reasonably be inferred. In the absence of evidence, the presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by the evidence. Spears *v.* Railroad Co., 43 Neb. 720, 62 N. W. Rep. 68. One of the causes contributing to the injury for which a recovery is sought in damages being the alleged negligent action of the defendant in permitting the floor where plaintiff stood to become wet and slippery, a finding in favor of plaintiff as to such allegation can only

be had when it affirmatively appears by proof that the employer has failed in the exercise of reasonable care in providing the employee with a reasonably safe place for the prosecution of the work required; and, if the alleged negligence does not so affirmatively appear, there can be no recovery as to such issue. Fenderson *v.* Railroad Co., 56 N. J. Law, 708, 31 Atl. Rep. 767. We do not wish to be understood as intimating that the condition of the floor was not a proper matter of evidence in establishing the facts and circumstances surrounding the transaction in which the injury was received, to be considered, with other facts and circumstances, for the purpose of determining defendant's alleged negligence in other respects, which caused or contributed to the injury received. What we mean to say is that we find nothing in the evidence or the pleadings warranting the submission to the jury the question of its existence as evidence of negligence on defendant's part with reference to its duty to provide a reasonably safe place for plaintiff to stand in the prosecution of the work in which he was engaged. The rule is that instructions to a jury are required to be applicable to the evidence, and grounded upon the pleadings in a case. Runge *v.* Brown, 23 Neb. 817, 37 N. W. Rep. 660; Dorsey *v.* McGee, 30 Neb. 657, 46 N. W. Rep. 1018. The instructions referred to assumed the possible existence of negligence on the part of the defendant by reason of the wet and slippery condition of the floor where the plaintiff stood, and authorized a recovery if the jury found the defendant negligent in that regard. There was no evidence upon which the existence of such fact might be based. These instructions had the effect of authorizing the jury to find negligence on the part of the defendant with respect to the condition of the floor, and return a verdict in plaintiff's favor, although at the same time they found that no right of action existed in favor of the plaintiff because of the alleged defective and improper construction of the machinery and the appliances connected therewith. This, we think, was error to the prejudice of the defendant. City of Crete *v.* Childs, 11 Neb. 252, 9 N. W. Rep. 555; Trust Co. *v.* Montgomery, 30 Neb. 33, 46 N. W. Rep. 214; Consaul *v.* Sheldon, 35 Neb. 247, 52 N. W. Rep. 1104.

Entertaining the views as above expressed, we regard the assignment of errors last discussed as being well taken, and, although reluctant to do so, we must again reverse and remand the cause for further proceedings.

Reversed and remanded.

RUNYAN v. CENTRAL RAILROAD COMPANY OF NEW JERSEY.

Court of Errors and Appeals, New Jersey, November, 1900.

CARRIER AND PASSENGER — RIGHTS OF PASSENGERS — RULES AND REGULATIONS — CUSTOM—RESISTANCE TO PASSENGER ENTERING TRAIN BY RAILROAD EMPLOYEES — EXPRESS PACKAGES. — 1. The evidence of usage presented in this case was sufficient to support a verdict that the defendant company, a common carrier, had adopted a rule that passengers might carry with them in the passenger cars their small parcels of merchandise.

2. Notice that passengers would not be allowed to act as express messengers was not inconsistent with that rule.

3. A trial judge is not required to charge whether part of a group of circumstances adduced to prove a fact is alone sufficient to establish the fact.

4. When a person has purchased a legal right to enter as a passenger the train of a common carrier, but is notified by an agent of the carrier that his right is denied, he may nevertheless make reasonable efforts *bona fide* to exercise his right, and physical resistance interposed by the carrier's agents to such efforts will constitute a tort, and in an action therefor the indignity, as well as the personal violence, may be considered by the jury as an element of compensatory damages (1)

MAGIE, Ch., and VAN SYCKEL, HENDRICKSON, and VREDENBURGH, JJ., *dissenting.* (Syllabus by the Court.)

ERROR to Circuit Court, Union County.

Action by Elmer Runyan against the Central Railroad Company of New Jersey. From judgment for plaintiff, defendant brings error. *Judgment affirmed.*

WILLIAM H. CORBIN, for plaintiff in error.

ROBERT H. MCCARTER, for defendant in error.

DIXON, J. — This suit was brought against the defendant, as a common carrier of passengers, to recover damages for torts committed in preventing the plaintiff from taking passage upon the defendant's trains at Jersey City and Communipaw. The ground on which the defendant company sought to justify the hindrance was that the plaintiff was carrying in his hands packages containing a wooden letter file and ten pounds of nails, which the company insisted should be sent by express or as freight. In reply, the plaintiff contended that, under the public regulations of the company, he was entitled to take his goods with him in the passenger car.

1. See former decision in the "Pony Express" case, 61 N. J. L. 537, 41 Atl. Rep. 367, reported in 5 Am. Neg. Rep. 58.

Originally, this litigation was in the form of an action on contract, which was before this court at March term, 1898, when we held that the company might, by its conduct, establish such a regulation as the plaintiff set up, and that the regulation, once made and published, could be rescinded only after reasonable notice. Runyan *v.* Railroad Co., 61 N. J. Law, 537, 5 Am. Neg. Rep. 58, 41 Atl. Rep. 367. Subsequently the suit on contract was discontinued, and the present action commenced, but a judgment obtained by the plaintiff was reversed in the Supreme Court because due proof of the regulation had not been adduced. Runyan *v.* Railroad Co., 44 Atl. Rep. 985. A second trial has resulted in the judgment for plaintiff now before us.

Numerous exceptions were taken at the trial, but it will suffice to notice in this opinion the points made in the brief of the defendant's counsel, whose skill is wont to leave no debatable proposition uncontested. First, it is argued that no regulation permitting the free carriage of small parcels of merchandise in the possession of passengers was established; that the practice in that regard shown by the testimony consisted of mere acts of indulgence on the part of the company's employees, and did not afford legitimate evidence of a regulation made by the company. So far as this contention is not met by the former decision of this court, we think it presented only questions of fact for the jury. Numerous witnesses testified that for many years past passengers had been in the habit of taking into the cars, and keeping near them throughout their journey, all sorts of merchandise, sometimes in closed packages, sometimes in open receptacles, and sometimes entirely uncovered, and that this common practice was never interfered with by the agents of the company, unless the articles were so bulky as to incommode other persons. This evidence formed a legal basis for an inference that the practice was known, not merely by the station and train men, but also by those to whom they were responsible, the officers and directors of the corporation, that the practice had the sanction of the company, and that the regulation relied on by the plaintiff really existed.

Secondly, the defendant insists that notice of the rescission of this regulation was given to the plaintiff. But we think the testimony afforded no evidence of such rescission. The matter proved was that the plaintiff, and perhaps the public, were notified that persons would not be allowed to use the passenger cars for the purpose of carrying on an express business, but no attempt was made to interfere with the common practice of passengers in possession of their own parcels. The objection to the plaintiff's entrance upon the

cars arose wholly from a false suspicion that he was acting as an express messenger, — a suspicion which he tried to dispel by repeated assertions that the packages were his own, and that he was acting for himself only, as at the trial the fact appeared to have been.

Thirdly, the brief refers to the question whether the court or jury is the proper tribunal for passing upon the reasonableness of the alleged regulation. But this question need not now be decided, for no request to submit the question to the jury was presented, and we see no cause to deny the reasonableness of a rule permitting travelers to carry into the trains small packages, which do not disturb other persons.

Fourthly, it is urged that the trial judge should have charged as requested touching the effect of the plaintiff's violation of the rules of the company. But, if the regulation set up by the plaintiff was proved, then there was no evidence that the plaintiff had violated any rule, and the judge explicitly charged that, if such regulation was not established, the verdict must be for the defendant. Nothing further could be necessary or useful.

Fifthly, it is objected that the judge refused to charge the following request: "The racks which were placed in the cars being shown to have been made and used for personal baggage, no presumption arises that the company thereby invited their use for the carrying of merchandise." The evidence did not show that these racks were used for personal baggage exclusively, and their common use for small packages of merchandise was one of the circumstances from which the plaintiff sought to have an inference drawn that they were provided for such packages as well as for baggage. But there were other circumstances to support such an inference, and a judge is not required to charge whether part of a group of incidents adduced to prove a fact is alone sufficient to establish the fact. Traction Co. *v.* Chenowith, 61 N. J. Law, 554, 35 Atl. Rep. 1067.

The last point to be noticed relates to the measure of damages. The objections urged are that the judge permitted the jury to give the plaintiff damages for the indignity which he suffered by being excluded from the cars in the presence of many onlookers, and refused to charge that damages could not be awarded for the resistance made to plaintiff's efforts to board the train after notice that he could not enter. The testimony tended to prove that the plaintiff had a ticket entitling him to ride from New York to Elizabeth; that with this he crossed the ferry to the Jersey City station, and then was forbidden by the defendant's agents to enter the cars with

his packages; that nevertheless he attempted to walk through the gate to the cars, but found his passage blocked by the men, and then desisted. Shortly afterwards he walked to the Communipaw station, and there bought from the company a ticket to Newark, and when a Newark train came along he quickly got upon the platform of one of the cars, but was knocked off by some of the company's employees at the station. He then hurried to another car, where the conductor of the train endeavored to make room for him to board the train, but the others interfered, and the train left without him. He then bought of the company another ticket to Elizabeth, but when the train arrived, two or three policemen appearing, he refrained from further effort, and departed. Under these circumstances, we think the resistance made to the plaintiff and the indignity suffered by him were proper matters for consideration by the jury on the question of damages.

The verdict in favor of the plaintiff implies that he had a legal right to enter the company's trains with the packages in his hands, by virtue of the ticket which he had purchased. This right rested, not merely on private contract, but on public law, which bound the defendant as a common carrier. The plaintiff was not necessarily obliged to forego his right because the company's agents told him to do so. He was entitled to make reasonable efforts to exercise his right, and if the jury determined that his conduct did not transgress the limit of reasonable effort, and was not *mala fide* for the purpose of provoking resistance or insult, then the wrong done could not be attributed to misbehavior on his part. The resistance interposed by the defendant's agents constituted a tort against the plaintiff's person, and therefore was actionable, and in such cases it is settled in this state that the accompanying indignity is a legitimate element of compensatory damages. Allen *v.* Ferry Co., 46 N. J. Law, 198 (1); Railroad Co. *v.* Walsh, 47 N. J. Law, 548, 4 Atl. Rep. 323 (2).

We find in the record no error calling for reversal of the judgment, and it is affirmed.

MAGIE, Ch., and VAN SYCKEL, HENDRICKSON, and VREDENBURGH, JJ., dissent.

1. Allen *v.* Camden & Phila. St. Ferry Co., 46 N. J. L. (17 Vr.) 198, is reported in 8 Am. Neg. Cas. 512 n.

2. Del. Lack & W. R. R. Co. *v.* Walsh, 47 N. J. L. 548, is reported in 8 Am. Neg. Cas. 509.

RUCH v. GAS ELECTRIC COMPANY OF BERGEN COUNTY.

Supreme Court, New Jersey, November, 1900.

STRIKING MATCH TO DISCOVER GAS LEAKAGE — EXPLOSION — CONTRIBUTORY NEGLIGENCE. — **Whether the striking of a match by the plaintiff, to discover where the smell of gas which he detects comes from, is negligence which contributes to the injury resulting from an explosion caused thereby, will depend upon the circumstances of the case, and is a question for the jury (1).**

(Syllabus by the Court.)

ERROR to Circuit Court, Bergen County.

Action by John Ruch against the Gas Electric Company of Bergen County. Verdict for plaintiff. Defendant brings error. *Affirmed.*

Argued June term, 1900, before the CHIEF JUSTICE and GUMMERE, LUDLOW and FORT, JJ.

DEMAREST & DE BAUM, for plaintiff in error.

RAYMOND P. WORTENDYKE, for the defendant in error.

FORT, J. — This was an action for damages for injury alleged to have been caused to the plaintiff by an explosion of gas discharged from the pipes of the defendant through the negligence and carelessness of the defendant's agents and servants in leaving the same uncapped after the removal of a gas meter from the armory building in the city of Englewood, in the county of Bergen. The plaintiff was the janitor of the building. It appears by the evidence that the meters were in a closet on the lower floor, and were two in number. There were places for three meters, but only two were set up. From the gas discharged through these meters the armory building was lighted. On the day of the accident, without the knowledge of the plaintiff, the agents or servants of the defendant had gone into the building and removed one of the meters because of the failure of some of the tenants to pay a gas bill. That the meter was rightly removed is not called in question. The only question is as to the negligence of the servants of the defendant in removing it. The plaintiff is a carpenter, and is engaged at his trade in the daytime, and in charge of the armory building at night. On the night of the 15th day of July, 1899, the plaintiff went to the building, as was his custom, to light it for use in the evening. He turned the gas on in

1. For other actions arising out of Explosions, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

the chandeliers, and endeavored to light them, but discovered that they would not burn properly, and states that he knew that something must be wrong; that he then went to see what was the matter, going to where the meters were located, and soon detected the smell of gas. It was dark, and he descended the stairway into the small hall, still smelling gas, and went to a side jet and struck a match for the purpose of lighting the gas to enable him to proceed, and to see in the closet where the meters were located. As he struck the match to light the gas, the door of the closet from which the gas meter had been taken by the defendant's servants flew open, and an explosion undoubtedly occurred, which the plaintiff is unable to describe, and he was thrown to the floor and his hand burned, and he was otherwise injured.

There is but one question in this case, it being admitted that the defendant's servants and agents were negligent in leaving the gas pipe uncapped after detaching the meter, and allowing large quantities of gas to escape into the closet, and thence, by the bursting of the door, into the hall; and that is, was the plaintiff guilty of contributory negligence in striking the match. All the other questions in the case are immaterial, and the ruling of the court upon them was unquestionably right, as was also the charge of the judge to the jury. The defendant moved at the close of the plaintiff's case for a nonsuit on the ground of contributory negligence on the part of the plaintiff, and all the court said in deciding this motion was "I decline to nonsuit on that ground. That is a question for the jury." Was it contributory negligence *per se* in this case for the plaintiff to strike a match to light the gas at the time and in the manner in which he did it? That appears, in our judgment, to be a clear question of fact for the determination of the jury, and the motion to nonsuit was rightly overruled on that ground. The plaintiff in an action for injuries resulting from the negligence of the defendant is not bound, as part of his case, to show affirmatively that the injury was not occasioned or contributed to by any negligence on his part. Express Co. *v.* Nichols, 33 N. J. Law, 434. It does not appear to us that the striking of the match by the plaintiff in this case, when searching to discover the difficulty, was in itself such a negligent act as to require the court to take the case from the jury, and to direct a nonsuit in favor of the defendant. The defendant had unquestionably produced the conditions which existed, and it had done it through the negligence of its servants; and the plaintiff knew nothing of the condition of affairs, and, in striking the match to ascertain the condition, he did that which almost any person similarly situated would have done. The jury found that the

plaintiff was not guilty of any negligence which contributed to this injury, and with this conclusion, under all the evidence in the case, we are not inclined to disagree. Where the negligence of the defendant is unquestioned, and there is doubt upon the question as to whether the negligence of the plaintiff contributed to the injury, it is a question for the jury, and such disposition was rightly made of it in this case. New York & G. L. R'y Co. *v.* New Jersey Electric R'y Co., 60 N. J. Law, 52, 37 Atl. Rep. 627; Connelly *v.* Railway Co., 56 N. J. Law, 700, 29 Atl. Rep. 438; Railroad Co. *v.* Middleton, 57 N. J. Law, 154, 31 Atl. Rep. 616; Mahnken *v.* Freeholders (N. J. Err. and App), 41 Atl. Rep. 921.

The refusal to nonsuit was proper, and we find no error in the record, and the judgment is affirmed.

GREEN v. ERIE RAILROAD COMPANY.

Court of Errors and Appeals, New Jersey, November, 1900.

ACCIDENT AT RAILROAD CROSSING — WAGON STRUCK BY TRAIN — CONTRIBUTORY NEGLIGENCE. — 1. The growing rapidity of train motion not prohibited by law, on the steam railroads and over their highway crossings, tends to create new and greater risks to the highway traveler and trains at such crossings, and demands the exercise of a degree of care in avoiding collisions, both by persons crossing and those in charge of the trains, in direct proportion to the added risks.

2. G., while standing up on his open wagon, loaded with stone, to which his horses were attached, in his effort to drive ahead of a west-bound train which he saw moving towards him about 300 feet away, attempted to cross the defendants' double tracks at a highway crossing, and was struck and injured by an east-bound express train moving towards him at a high rate of speed from the opposite direction, but which an intervening hill prevented him, after reaching the tracks, from seeing until it was about 400 feet from him. *Held*, that he was clearly guilty of contributory negligence productive of his injury, which proper caution would have prevented, to be deduced from the circumstances then existing, and more fully detailed in the following opinion (1).

(Syllabus by the Court.)

1. For other actions relating to Collisions at Railroad Crossings, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Among recent actions relating to Collisions at Railroad Crossings, are the following:

Wagon struck by train at private crossing — Failure to signal.—In LOUISVILLE & NASHVILLE R. R. CO. *v.* BODINE *(Kentucky, December, 1900)*, 59 S. W.

ERROR to Supreme Court.

Action by William Green against the Erie Railroad Company. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

EUGENE EMLEY, for plaintiff in error.

WILLIAM B. GOURLEY, for defendant in error.

VREDENBURGH, J. — The exceptions sealed to the rulings of the trial justice in this cause, denying the defendant's several motions to nonsuit and to direct a verdict for defendants require on this writ

Rep. 740, judgment for plaintiff for $1,500 was affirmed. It appeared that plaintiff, the 18-year-old son of the owner of a farm through which a private crossing was put in by the railway company, while passing over the crossing from east to west, driving a wagon, was struck by a train and injured. The train failed to give any signal of its approach. *Held*, that while, generally, trains are not required to give signals of approach at a private crossing, yet, "in this case, in view of the dangerous character of the crossing, its long use, not only by Bodine, but by the public, the fact that signals were accustomed to be given by trains as they approached it, the speed of this train, and the fact that it was a special, imposed upon appellant the obligation to give such warning of its approach to this crossing as exigencies of the situation demanded for the protection of human life. And, as no warning at all was given, we think the jury were warranted in concluding that proper precaution was not exercised by appellant, and that by reason of this the accident occurred." (The court cited Johnson *v.* R. R. Co., 91 Ky. 651, 25 S. W. Rep. 754; Cahill *v.* R'y Co., 92 Ky. 345, 18 S. W. Rep. 2; R. R. Co. *v.* Survant (Ky.), 44 S. W. Rep. 88; Czech *v.* R'y Co. (Minn.), 2 Am. Neg. Rep. 181, 70 N. W. Rep. 791; Thomas *v.* R. R. Co., 8 Fed. Rep. 729; Railway Co. *v.* Boozer, 70 Tex. 536, 8 S. W. Rep. 121; Swift *v.* R. R. Co., 123 N. Y. 649, 25 N. E. Rep. 379.)

Wagon struck at railroad crossing — Fright — Physical injuries — Damages — Demurrer. — In WARD *v.* WEST JERSEY & SEASHORE R. R. Co. *(New Jersey Supreme Court, November, 1900)*, 47 Atl. Rep. 561, there was judgment for defendant on demurrer to the declaration. The facts of the case and the point decided are stated by GUMMERE, J., as follows: "The declaration alleges that the plaintiff, while driving along a public highway at a point where it was crossed by the defendant's railroad, was permitted, without warning from the defendants, to drive upon the crossing, in the face of an approaching train; that the gates by which the crossing was protected were raised when he drove upon it, but were carelessly and improperly lowered by the defendants' gate-keeper before he was able to pass entirely over, whereby he was subjected to great danger of being run down and killed by said train; and that, by reason of the danger to which he was thus exposed, he was shocked, paralyzed, and otherwise injured. The question which the demurrer presents is this: Whether, in an action for negligence, the mere apprehension of personal injuries, which are not in fact received, will support an action, when physical suffering follows as a consequence of the mental disturbance. It seems to be universally conceded that mere fright, from which no subsequent physical suffering results, affords no ground for action; but, in cases where physical

of error a review by this court of the case as presented to the trial court. We think that the plaintiff's conduct in attempting to drive across the railroad tracks under the admitted conditions then existing should be held to have been a negligent act so clearly contributive to his injury as to bar him from recovery of damages. The case was carefully tried, and is one of public importance in the large field

injuries follow therefrom, the decisions are not harmonious. In my judgment, however, those cases which hold to the view that there can be no recovery for such injuries rest upon sound legal principles, and should be followed. The courts of Maine, Pennsylvania, New York, and Massachusetts, as well as those of England, are prominent among the tribunals which hold to the view which I have expressed." (Reviewing several authorities.)

Wagon struck by train at crossing — Negligence for jury. — In WILLEY *v.* BOSTON & MAINE R. R. CO. *(Vermont, February, 1900)*, 47 Atl. Rep. 398, action by William H. Willey against the Boston & Maine Railroad Company to recover for injuries received by him by being struck by defendant's train at a highway crossing, judgment on a verdict directed for defendant was reversed. The facts are stated by MUNSON, J., as follows: "The court directed a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence. It is not necessary to inquire how the case stood in this respect, for there was evidence tending to establish facts upon which the plaintiff could recover although negligent. When it became apparent that the plaintiff was going upon the track, it was the duty of the defendant to do what it could to avoid injuring him. Trow *v.* Railroad Co., 24 Vt. 487; Pennsylvania Co. *v.* Sinclair, 30 Am. Rep. 190, note; Deans *v.* Railroad Co., 107 N. C. 686, 12 S. E. Rep. 77, 22 Am. St. Rep. 902, note; Coasting Co. *v.* Tolson, 139 U. S 551, 11 Sup. Ct. Rep. 653, 35 L. ed. 270. See Magoon *v.* Railroad Co., 67 Vt. 177, 31 Atl. Rep. 156. The fireman testified that the plaintiff was first seen from a distance of about thirty rods, and that he was then about fifteen feet from the crossing; that the brake was applied about fifteen rods from the crossing, just as the horse was going upon the track; that there are two applications of the brake, the service and the emergency, of which the second is much the stronger; that the service application is obtained by throwing the lever into the nearer or service notch, and the emergency by throwing it into the further notch; that the engineer gave the emergency application; that when witness was examined before the railroad commissioners, in reply to the question, 'Do you know if the engineer applied the emergency brake?' he replied, 'I do not think so; he might have got the emergency application of the brake;' that he meant by this that the engineer made the service application so quickly that he thought possibly he got the emergency application; and, further, 'I thought that he got the emergency application of the brake when he put it around to the service notch.' It appeared that the horse got across the track, and that the engine struck the buggy. This evidence entitled the plaintiff to claim to the jury that the defendant did not do all that it could to prevent the disaster, and that its failure in this respect was the cause of his injury. As the judges are not entirely agreed in their views regarding the plaintiff's conduct, and, as the case may be varied upon another trial, we do not pass upon the question of contributory negligence."

of constantly occurring railroad crossing accidents. Instead of relaxing in the least degree the legal rules of caution required to be observed by those attempting to drive vehicles, however drawn or moved, over such crossings, it seems to me that present conditions demand even a more strict adherence to those rules. The growing rapidity of train motion, and the increased use of the highways for locomotion thereon in its great variety of forms, tend to create new and greater risks to the traveler at those crossings, and demand the exercise of care in avoiding accidents both by persons crossing, as well as by those in charge of the trains, in direct proportion to such added risks. This general idea was recognized by the able and experienced judge who tried this case below when he said, in his charge to the jury, that "that which is reasonable care rests with the danger; the greater the danger, the greater the care." While the trains on the steam railroads over their lines and highway crossings have lawfully the exclusive right of way, and no legislative prohibition forbids such increase of train speed, it must be assumed by the courts that the public encourages, even if it does not demand, such speed. The permanent laying down and use of heavy steel rails for the support of immense steam engines of the most powerful type, by means of which cars thereon are oftentimes propelled faster than a mile a minute, has certainly increased the danger of collisions at these crossings. These important changes, involving consequent increase of risks, must, in the interests of life and property, equally on both highway and railroad, be recognized and met by the decisions of the courts. The material facts upon which the plaintiff's verdict rests, are the following: About nine o'clock in the morning of February 10, 1897, the Erie nine o'clock express train, running at a high rate of speed, on its usual scheduled time, at the Summer street crossing, in Passaic, on its way over its east-bound track to Jersey City, struck the plaintiff's loaded open wagon, upon which he was then standing and driving his horses, and produced the injury which is the subject of this suit. At this point the railroad had two tracks. The west-bound was the first he had to cross before reaching the east-bound, and, after crossing the first, or most westerly, rail of the first track, he had to drive thirteen feet further on in order to reach the first rail of the east-bound track, upon which the accident occurred. The most westerly rail of the west-bound track was distant thirty-eight and one-half feet, measuring from the corner of a building or shop standing on the corner of Summer street. After passing this obstruction, it is admitted that he had a clear view of the track in the direction the train was coming for a distance of not less than a quarter of a mile,

notwithstanding the fact that there was a curve of the track there in the line of his view. It cannot be the subject of dispute, under the evidence, that the train, which in fact so quickly overtook him, must have been, at the time he drove past this building, running somewhere within that quarter of a mile; nor can it be doubted, from his own testimony, that, except the first look he says he gave at the corner of the building, he did not look again, after passing beyond the corner of that building, and before he himself (not his horses) actually came between the two tracks. He swears that at that corner he looked, and saw no train; and his credibility is not here open to discussion. But other parts of his evidence make it apparent — as, indeed, the disastrous sequel has demonstrated — that at the time he says he so looked the train was in fact within the range of his eyesight, and that, if he failed to see it, he must have thrown a very careless glance in its direction. Every reasonable calculation, based upon the evidence of the speed of that train, relative to that of the plaintiff's walking horses, as well as the carefully taken photographs in evidence, tend to show that the train at that time must have been not more than 800 feet away from the place of collision. The following extracts from his cross-examination are important to be stated in this connection: "Q When you came towards the railroad through Summer street, and cleared the shop, you say you looked? A. Yes. Q. How far could you see at that point? A. About a quarter of a mile. * * * Q. Don't you know that where the train comes into view from Clifton, around that slight curve, is more than half a mile from Summer street? A. I know that it's not more than half a mile. Q. How do you know that? A. I walked it this morning. Q. How long did it take you? A. About four minutes. * * * Q. How near to the railroad must a man approach on Summer street before the hill will interfere with his view? A. About between the two tracks. * * * Q. Where would you be when this hill would interfere with your vision? A. Between the two tracks. * * * Q. You got fairly on the track before you took the second observation? A. Yes, sir. Q. And then did you look the second time? A. Yes, sir; it struck me right away.' Elsewhere also he testified as follows: "When I got the horses on the down [east] track, I looked around again, and the train had run right down on top of me. * * * Q. Where were you, upon the track, when you saw the locomotive? A. The horses were right on the down track, — the front feet of the horses." It is thus entirely clear from the plaintiff's own testimony that he made no other effort to ascertain the place of the coming train until it was "on top" of him, except the one look when at the building,

and before he drove the thirty-eight feet towards the tracks. He had a time-table of the road in his possession, and from this, as well as from his own experience as a teamster in that locality, he had reason to believe that that express train was due there about that time. He had no reason to think it had yet passed, and it is nowhere in the case claimed that he supposed it had. This crossing was known to him as a very dangerous one, or, to adopt the language of his own declaration, as "one of extraordinary danger," for the reason, given by him in his testimony, that, after entering upon the tracks, a hill hid the east-bound track for a distance of about 400 feet from his view. He was incumbered with a load of stone, which common experience should have taught him would make quick escape from a fast moving train impossible. Yet he admits that he did not look at all for the train after he left that corner until looking became almost hopeless, and the train was "upon him" This was certainly a failure "to exercise the highest practicable degree of care in avoiding the danger," and was clearly contributory negligence, as defined by this court in the Leary case (cited hereinafter), unless some circumstances intervened to excuse such failure. The circumstances relied on as such excuse appear in the following extracts from his testimony, viz.: "When I got to that corner, I looked toward Clifton, and saw the train [the west-bound]; but I saw I had time to go ahead of it, and drove on; and when I got the horses on the down track I looked around again, and this train [the east-bound] had run right down on top of me. * * * I saw I had time to pass ahead [the west-bound], and I drove on. Before I got across, this train [the east-bound] came from behind the hill." He thus admits that when he was at the corner of Summer street, and at least thirty-eight feet away from the nearest track, he voluntarily and deliberately drove out of a place of safety and into a place defined by himself as "one of extraordinary danger." Instead of waiting at the corner where he was, when he saw a train moving from the opposite direction towards him (it is said in the evidence about 250 feet to 300 feet away), for it to pass, he chose to take the double risk of getting ahead of both trains, when, if he had waited but for a few moments, he would have certainly avoided not only the approaching train he saw, but also the other approaching train, which he could not, after advancing further to the tracks, see, because the train that struck him reached the crossing first. This clearly appears by the evidence of the engineer of the west-bound train, and, indeed, is a necessary deduction from the plaintiff's testimony, as well as from the rate of his progress as compared with that of the respective trains and the measurements of distances

above given. The folly of his driving on the west-bound track, where he could not stop without certain destruction, and from which he could not escape except by either retreating, hampered by a loaded wagon, or by further advancing upon the next track, where he had reason to believe the nine o'clock express might make the danger still more imminent, needs no further comment. If it be claimed that his sight of the approaching west-bound train produced in his mind a state of perplexity, it is impossible to yield to such claim, because he was then in no kind of danger; but, even so, he had the remedy in his own hands. After he saw the west-bound train, he had ample opportunity to halt, and avoid all danger. He needed only to stop or check his walking horses. He was in a place of perfect security, where he could have remained until the danger was over. Under the conditions above presented, the plaintiff's doubt or perplexity, while he occupied a place of safety, should have been resolved by him in favor of the safer course. He cannot be permitted to offer in excuse of his negligent act in failing to look more carefully while his view was unobstructed for the coming of the train (which was then due, but which he, after reaching the place of danger, knew he could not see) the still more negligent act of driving in front of the train which he did see; and if his load of stone had thrown the colliding train from the track, resulting in loss of life therein or destruction of property, a serious question of his own responsibility therefor might have been presented. But certainly he has no standing in court as a plaintiff to force others to pay for his hazardous experiment that day. The following decisions of this court, founded upon somewhat similar circumstances, afford support for these conclusions, viz.: Railroad Co. *v.* Righter, 42 N. J. Law, 180; Merkle *v.* Railroad Co., 49 N. J. Law, 473, 9 Atl. Rep. 680; Railroad Co. *v.* Leary, 56 N. J. Law, 705, 29 Atl. Rep. 678; Railroad Co. *v.* Smalley, 61 N. J. Law, 277, 4 Am. Neg. Rep. 197, 39 Atl. Rep. 695; Conkling *v.* Railroad Co., 63 N. J. Law, 338, 43 Atl. Rep. 666; Keyley *v.* Railroad Co. (N. J. Err. and App.), 7 Am. Neg. Rep. 452, 45 Atl. Rep. 811; Dotty *v.* Railroad Co. (N. J. Err. and App.), 8 Am. Neg. Rep. 93, 46 Atl. Rep. 772.

The judgment below should be reversed.

HUGHES v. CAMDEN AND SUBURBAN RAILWAY COMPANY.

Court of Errors and Appeals, New Jersey, November, 1900.

DRIVING ON STREET-CAR TRACK — COLLISION — NEGLIGENCE FOR JURY. — 1. Plaintiff was driving, at night, a one horse wagon along a public highway, and upon the right-hand or out-bound track of defendant. Plaintiff had notice that an out-bound car desired to pass him upon that track. He turned upon the left-hand or in-bound track, and after proceeding some sixty feet the wagon was struck by an in-bound car with such violence as to justify the inference that the car was running at very great speed, or at such speed that the motorman could not stop after the wagon was perceived by the light from the headlight, which was burning. *Held*, that there was a question for the jury, as to the negligence of the motorman in running and managing his car (1).

2. There was evidence from which a jury might find that plaintiff would have been put in peril if he had turned out to the right. *Held*, that he was not necessarily negligent in turning to the left, although he was thus brought upon the in-bound track, but that there was a question for the jury, whether or not his act was wanting in proper prudence.

(Syllabus by the Court.)

1. For other actions arising out of Collisions between Vehicles and Street Cars, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See also, note on COLLISIONS ON STREET RAILROADS, 8 AM. NEG. REP. 240–246.

Among recent actions relating to Collisions on Street-Car Tracks, are the following:

Vehicle struck by street car — Care required of motorman — Question for jury. — In O'LEARY *v.* BROCKTON STREET R'Y CO. *(Massachusetts, November, 1900)*, 58 N. E. Rep. 585, action in tort by one O'Leary against the Brockton Street-Railway Company for injuries received in a collision, it appeared at the trial that plaintiff stopped his team on the side of the street, between the sidewalk and the tracks of defendant company. The defendant's car came along, and hit the rear wheel of plaintiff's carriage, breaking it, causing the horse to run, and throwing plaintiff out and injuring him. The verdict was for defendant, and plaintiff excepted. HAMMOND, J., said: "The plaintiffs' requests for instructions were all properly refused. Each one of them makes it imperative, under the conditions therein stated, that the motorman should have taken such measures as would avoid a collision. But the real duty upon him was simply to use reasonable care to avoid a collision. The motorman testified that he saw the plaintiff's team, and had complete control of his car, but he did not stop, because he thought there was room to go by. It was a question for the jury whether, in coming to that conclusion, and acting upon it, he was negligent. No exceptions were taken to the instructions actually given, and they seem to have been sufficiently full. Exceptions overruled."

Person riding in wagon killed in collision with street car — Negligence of

ERROR to Circuit Court, Camden County.

Action by Ward Hughes against the Camden & Suburban Railway Company. From judgment for defendant, plaintiff brings error. *Judgment reversed.*

GEORGE J. BERGEN, for plaintiff in error.

E. A. ARMSTRONG, for defendant in error.

MAGIE, Ch. — The judgment brought under review by this writ of error was founded on a compulsory nonsuit directed by the trial judge at the conclusion of plaintiff's case. The action was in tort,

driver of wagon. — In HILTS *v.* FOOTE *(Michigan, November, 1900)*, 84 N. W. Rep. 139, action by Sarah L. Hilts, as administratrix of the estate of Frederick Hilts, deceased, against William A. Foote, receiver of the Jackson City Street-Railway Company, a judgment in favor of defendant was affirmed. It appeared that "one Eugene Thompson was the driver of a milk wagon, and was then engaged in delivering milk to various places in the city. The wagon was covered, and had openings on the sides twenty and one-half inches wide and fifty-three inches high. The seat was just back of these openings, so that the knees of the driver came about opposite them. Thompson met the deceased, Frederick Hilts, a young man twenty-seven years of age, and invited him to ride with him. They were riding north on Perrine street, and when the wagon was upon the track it was struck by a car, and Hilts was killed. Main street is ninety-nine feet wide, sixty-three feet between the curbing, and the distance from the curb to the center of the car track in thirty-one and one-half feet. One standing or riding in the center of Perrine street eighteen feet south of the south line of the sidewalk can see a car coming from the east on East Main street one block, — about 320 feet. On approaching six feet nearer, the car can be seen three blocks east, and when at the curb the car can be seen 104 rods east. Thompson testified that his horse was on a good, fair trot; that he first noticed the car when he was just across the sidewalk; that when he got about to the sidewalk he looked west, saw no car, then turned to look east; that by that time he had got across the walk, saw a car coming, and was afraid it was going to strike him; whipped up his horse, and tried to get across. On cross-examination he testified that he should judge he was driving at the rate of five miles an hour, perhaps more; that he and the deceased were chatting along about various things; that the first time he thought to look for the cars was as he was nearing the crosswalk; that he did not slack his horse at all when he came to the street, but just kept right on, — was anxious to get through, and his mind was intent upon that, that he had got as far as the curbing, anyway, when he looked east." GRANT, J. (after stating the facts), said: "It is manifest from this record that Thompson drove upon East Main street without slacking his speed, without looking for the car until he was so near the track that he thought it impossible to stop his horse before the car would strike him. He was responsible for the situation. Even where there are no street cars, a party driving from one street into and across another is bound to be on the lookout for teams traveling along the street, and to keep his horse under control. Thompson had ample time to look both west and east in time to see the approaching car and stop so as to avoid the accident. It was his duty to do this. There is

and was brought to recover damages claimed to have been received by the plaintiff by a collision between a trolley car of defendant, managed by its servants, and a wagon which plaintiff was driving npon the public highway. The bill of exceptions shows that, after plaintiff had rested his case, defendant's counsel moved to nonsuit upon the ground that the evidence did not justify a verdict for plaintiff, either because it failed to establish any breach of duty owed plaintiff by defendant, or because it established negligence of the plaintiff, contributing to his injury. The trial judge granted the

nothing in the record to justify the conclusion that the motorman deliberately and recklessly ran Thompson down after seeing that he was in danger. There is no evidence upon which to charge such inhuman conduct upon the motorman. Judgment affirmed."

Driving on street car track — Collision — Negligence for jury. — In GALLEGHER *v.* MANCHESTER STREET R'Y *(New Hampshire, March, 1900)*, 47 Atl. Rep. 610, defendant's exceptions to judgment for plaintiff were overruled. "The plaintiff's evidence tended to prove the following facts: The Candia road runs east and west, and the defendants' tracks are upon the southerly side, next to its junction with the Lake Shore road. The east-bound cars run upon the southerly track, and the west-bound cars upon the northerly track. There is no obstruction to the view of the southerly track from the Candia road, except such as may be caused by cars upon the northerly track. The plaintiff drove easterly upon the Candia road, and turned to go upon the Lake Shore road. He waited for two west-bound cars to pass, then looked in both directions, and, when the last car was about twenty feet beyond the crossing, seeing no cars approaching, he attempted to cross the tracks. When he started he could see about sixty feet up the south track. When he got part way across he saw, about eighty feet distant, a car approaching from the west at a high rate of speed. He attempted to turn back, and nearly succeeded in doing so, but the running board of the car caught the off hind wheel of his wagon, and he was thrown out and injured. The motorman made no attempt to stop until within fifty or sixty feet of the crossing, and not until he had been warned to do so by the bystanders. He then applied the brake, but did not reverse the power. The car might have been stopped much sooner than it was. The defendants' evidence tended to contradict the plaintiff's. The defendants' motions for a nonsuit and that a verdict be directed for them were denied, subject to exception." *Held*, that the case was properly submitted to the jury, and motion for nonsuit properly denied.

Milk wagon struck by street car — Negligence of parties for jury. — In MAPES *v.* UNION R. R. CO. OF NEW YORK CITY *(New York Supreme Court, Appellate Division, Second Dept., December, 1900)*, 67 N. Y. Supp. 358, judgment dismissing plaintiff's complaint was reversed. The facts (as stated in the opinion by GOODRICH, P. J.) are as follows: "The plaintiff was driving a milk wagon along the Southern Boulevard in New York city, at five o'clock in the morning of November 2, 1898, when he was struck by a car of the defendant and received serious injuries. The boulevard at the place of the accident runs from southwest to northeast, is paved, and about sixty feet wide, and the defendant's road is in the middle. The wagon was covered and inclosed except for the front and

motion and directed the nonsuit solely on the ground that the negligence of defendant's servants was not made out by the evidence so as to support a verdict for the plaintiff. If, upon evidence which the jury might credit, and inferences reasonably to be drawn therefrom, such negligence was established, the ruling complained of was erroneous. From the evidence in the bill of exceptions the following facts might be found to be proved: Plaintiff was driving his wagon at night, with one horse, from Camden towards Haddonfield, upon a public highway, along which the two tracks of defendant's railway ran. He was driving on the right-hand track, upon which the out-bound cars run. An out-bound car came up behind plaintiff's wagon, and its presence was made known to him by the ringing of its bell. As plaintiff was proceeding at a walk, he rightly turned from the right-hand track. He was bound to give the car approaching from behind a reasonable opportunity to pass upon the track, from which it could not deviate. Railway Co. *v.* Isley, 49 N. J. Law, 468, 10 Atl. Rep. 665; Traction Co. *v.* Haight, 59 N. J. Law, 577, 2 Am. Neg. Rep. 192, 37 Atl. Rep. 135; Butelli *v.* Railway Co., 59 N. J. Law, 302, 36 Atl. Rep. 700.

On the right side of that track was a narrow driveway, affording barely enough space for a wagon to pass a car between it and a

two doors on the sides. The plaintiff was just to the rear of the two doors, and had milk cans piled up before and behind him. There was a lantern inside the wagon, but no light was visible from the rear. He drove up the boulevard towards the northeast, and delivered milk at a place on the right-hand side, then crossed the tracks, turned back, and, after driving down the boulevard about 800 feet, came to a pile of building materials which extended about 100 feet along the curb on the right and out to such a distance that, in order to pass it, he had to drive out onto the defendant's tracks. There is no evidence that he looked for an approaching car at any time until he was half way along the pile, when, hearing a noise, he looked out, and saw a car behind him at a distance of 'less than twenty feet,' and running rapidly. He endeavored to get out of the way, but failed to do so, and the car ran violently into the wagon, which was partly on the right-hand track. The motorman was called as a witness for the plaintiff, and testified: 'The car was going at the rate of twenty-five miles an hour, and I was asleep.' At the close of the plaintiff's evidence the defendant moved for a nonsuit on the ground that it appeared affirmatively that the plaintiff was guilty of contributory negligence, and that it did not appear that the defendant was guilty of negligence, or solely to blame for the accident. The court granted a 'nonsuit; not on the merits.'" *Held*, that it was error to grant nonsuit, as it could not be said, as matter of law, that plaintiff was guilty of contributory negligence, the question being for the jury to determine. (GOODRICH, P. J., reviewed several authorities on the question of contributory negligence as matter of law.) Judgment reversed, WOODWARD and BARTLETT, JJ., concurring; JENKS, J., dissenting.

roadside ditch about four feet deep. Plaintiff, deeming, as he testified, that it was perilous to turn out to the right in the darkness, turned to the left, and drove upon the in-bound track. He proceeded upon it until after the car upon the other track had passed him. After going some sixty feet, plaintiff's wagon was struck by an in-bound car of defendant, which came from around a curve on the right, over 400 feet distant. The left fore-wheel of the wagon was demolished, the wagon overturned, the horse thrown down so that his head lay in the opposite direction from that in which he had been going, and plaintiff was thrown out and received serious injury. From these facts a reasonable inference can be drawn that plaintiff was turning his wagon from the left-hand track to resume his position on the right-hand track, either because of an intention to proceed upon the track as he had been doing when required to leave it to permit the passage of the out-bound car, or because he perceived the coming car on the in-bound track, which was lighted and had a headlight burning. It might also be reasonably inferred that the car which collided with plaintiff's wagon with such force and effect was traveling at such speed that it could not be stopped after its headlight revealed plaintiff's wagon, or that its speed was not diminished when the wagon was perceived. Upon these facts, and the inferences the jury might reasonably draw therefrom, I entertain no doubt that there was a case for the jury; for they would have been justified in finding negligence in the motorman, either in driving his car at a speed dangerous to other travelers on the highway, or because, if the speed was not excessive under ordinary circumstances, it was yet so great as not to permit him to arrest the car after he perceived, or should have perceived, plaintiff's wagon, or he did not attempt to do so. The direction of the nonsuit cannot be sustained on this ground.

But this conclusion does not dispose of the case; for, although the trial judge declared that he could not say that plaintiff was shown to be guilty of negligence contributing to his injury, and refused the motion to nonsuit on that ground, if the bill of exception discloses that he erred in this respect, and that, as matter of law, the plaintiff, on the evidence, was guilty of contributory negligence, the judgment ought not to be reversed. An examination of the evidence puts it beyond doubt that the nonsuit should not have been granted on that ground. When plaintiff was required to remove from the right-hand track to permit the passage of the car from behind, he was bound to exercise a reasonable judgment as to how he could do so in safety. If it was perilous to go to the right,

and reasonable prudence required, he could go to the left, notwithstanding the in-bound track of the defendant was there maintained. Traction Co. *v.* Reeves, 58 N. J. Law, 573, 34 Atl. Rep. 128. For reasons of safety, a traveler may use any part of a highway, having due regard to the rights of others, and taking such care as prudence would require him to take in the position he assumes. If he thus uses a highway, he may assume that others using it, including trolley-car companies, will use it with a due regard to his rights. Upon the evidence, it was for a jury to say whether there was danger in turning to the right, such as a traveler in the exercise of reasonable prudence would avoid; whether, after he reached the left-hand track, he took reasonable care to observe and give place to a car approaching upon that track. All these were questions to have been decided against him before plaintiff could have been pronounced negligent.

The result is that the case should have gone to the jury, and the judgment must be reversed.

UPPINGTON v. THE CITY OF NEW YORK.

Court of Appeals, New York, January, 1901.

DAMAGE TO PROPERTY — NEGLIGENT WORK BY INDEPENDENT CONTRACTORS — CITY NOT LIABLE. — In an action against the city to recover damages alleged to have been sustained from injuries to plaintiff's house through the construction of a sewer by means of an open trench in the street on which the house was situated, the sewer being a relief sewer to carry off surface water which, after heavy storms, flooded a portion of the city quite remote from plaintiff's property, it appeared that the work of constructing the sewer was let to independent contractors, the plan decided upon being reasonably safe. *Held*, that the city was not liable for injury caused by work performed in negligent manner by independent contractors (1).

MUNICIPAL CORPORATIONS — INDEPENDENT CONTRACTORS. — Where a municipal corporation has power to let work for public improvement and enters into contract with competent contractors, doing an independent business, who agree to furnish the necessary materials and labor and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, the contractors are not the servants or agents of the city, but are independent contractors, and the municipal corporation is not liable for their negligence, even when it reserves the

1. For other actions relating to Liability of Municipal Corporations and of Independent Contractors for Injury to Property, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

right to change, inspect and supervise, provided the plan is reasonably safe, the work lawful, is not a nuisance when completed, and there is no interference therewith by its officers which results in injury.

INDEPENDENT CONTRACTORS — TEST. — Independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, in an action by Mary T. Uppington against the city of New York, affirming a judgment for the city entered upon a verdict rendered under the direction of the trial court. *Judgment affirmed.*

"This action was brought by an abutting owner upon Greene avenue, in the Borough of Brooklyn, to recover damages alleged to have been sustained from injuries to her house through the construction of a sewer by means of an open trench in said street. The sewer is known as a relief sewer, to carry off surface water which, after heavy storms, flooded a portion of the city quite remote from the plaintiff's property.

"Upon the trial there was evidence tending to show that the trench, dug for the purpose of laying the sewer, caused the ground to settle in front of the plaintiff's premises and injured her house to the extent of $1,500, as claimed by her, although the jury upon the first trial assessed her damages at the sum of $500.

The verdict was set aside, however, upon appeal, and a new trial was granted on the ground that she had not made out a cause of action. Upon the second trial, which is now under review, the same facts appeared, and at the close of all the evidence the trial judge directed a verdict for the defendant.

"Greene avenue is a public street, seventy feet wide and thirty-five feet from curb to curb. It is well built up with dwellings upon either side, ranging from two and a half to three and a half stories in height. The most of the buildings stand back ten feet from the line of the street, while some, including that of the plaintiff, stand upon the line. The soil under the street is compact gravel and sand, and contains boulders, some of which are four or five feet in diameter. The depth of the excavation in front of the plaintiff's premises was about thirty-five feet, the width at the top eighteen feet, and the sewer was ten feet in diameter, when measured inside.

"The entire length of the sewer, including branches, was more than three miles, but for the most of that distance the diameter ranged from five feet to twelveinches, although for a part of the way it was from twelve to fifteen feet.

"The work was let to the firm of James J. Moran & Co., who agreed to construct the sewer according to the specifications, and furnish all the materials and labor required for a given sum per running foot, varying with the size. The method of construction provided by the specifications was through an open trench, to 'be opened one foot wider on each side than the exterior diameter of the sewer,' which was to be twelve feet. The sides of the excavation were to be 'supported with suitable plank and shoring, whenever necessary.' The contractors were required at their own expense to 'shore up, protect, restore and make good, as may be necessary, all buildings, walls, fences or other properties which may be disturbed or injured during the progress of the work;' 'to do everything necessary to protect, support and sustain the buildings on both sides of the street,' and were to 'be held responsible for all damages which may happen to neighboring properties.' A sufficient quantity of timber and plank was to be kept constantly upon the ground and used 'as required for bracing and sheathing the sides of the excavation.' Before breaking ground written notice of at least twenty-four hours was to be given to all persons whose interests might be affected by operations under the contract. The contractors were to promptly remove the surplus earth, relay crosswalks, replace broken stones, regrade and repave the streets to the extent required by the work, and keep the materials excavated so trimmed as to be of as little inconvenience as possible to the public and the adjoining tenants. All damages resulting to buildings, etc., through the negligence of the contractors were to be paid by them, and they were required to give a bond to indemnify the city against all suits brought on account of injuries sustained through the construction of the work, 'or by or on account of any act or omission of' the contractors or their agents. In addition to this the city was authorized to retain enough money otherwise going to the contractors to make good all losses to third persons. The city engineer was to 'have the right to regulate the excavation,' and not 'more than 400 feet of trench' was to be opened at one time without his permission, while the commissioner of city works was authorized to 'change at his discretion the amount of all the various kinds of work and materials and structures.' The contractors were required to observe all the ordinances of the common council in relation to obstructing the streets, and 'in all cases of rock blasting the blast' was 'to be carefully covered with heavy timber, according to the ordinances of the common council' relating to the subject, 'which ordinances shall be strictly observed.' If any person employed by the contractor should 'appear to the engineer to be

incompetent or disorderly,' he was to be discharged and not employed again without permission. The engineer, with the consent of the commissioner, had power 'to vary, extend or diminish the quantity of work during its progress without vitiating the contract.' It was also provided that 'all explanations and directions necessary to the carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract will be given by said engineer.' The city had the right to inspect the work and materials to see that they corresponded with the specifications. Any materials or implements brought upon the ground which the engineer 'should deem to be of improper description or improper to be used in the work,' were to be removed forthwith. The contractors were to have charge of and be responsible for the entire line of work until its completon and acceptance, and were not to be paid for any part thereof until the whole sewer was finished. The specifications contained many provisions relating to details of the work that are usually found in municipal contracts for the building of sewers.

"The plaintiff's lot, as described in her deed, begins at a fixed point 'on the southerly side of Greene avenue,' and the third course runs 'to the southerly side of Greene avenue and thence' by the fourth course 'westerly along Greene avenue to the place of beginning.' The house on said lot consisted of three stories and a basement, and cost $9,300.

"Further facts are stated in the opinion."

JAMES TROY and GEORGE W. WINGATE, for appellant.

JOHN WHALEN, Corporation Counsel (WILLIAM J. CARR and R. PERCY CHITTENDEN of counsel), for respondent.

VANN, J. — When a municipal corporation has general authority by statute to make a public improvement in a public street, which does not involve direct encroachment upon private property, it is not liable for consequential damages, unless they are caused by negligence, misconduct or want of skill on the part of its servants or agents. Atwater *v.* Trustees of Canandaigua, 124 N. Y. 602; Radcliffe *v.* Mayor, 4 N. Y. 195; Transportation Co. *v.* Chicago, 99 U. S. 635; 2 Dillon on Munic. Corp., sec. 1029; Shearman & Redfield's Negligence, sec. 272. In such cases the corporation is the agent of the State, and acts done in the proper exercise of governmental powers do not make such agent liable at common law, even if they indirectly affect but do not directly invade private property. If the work is unlawful, the injury wilful, or the damages are owing to the failure of the proper authorities to exercise due care or skill,

there is no exemption from liability, even when the undertaking is wholly for the benefit of the public.

The relief sewer, which is the subject of this controversy, was lawful, because it was built wholly in a public street, without encroaching upon private property, and was duly authorized by statute. Such damages as were inflicted upon abutting property were an indirect result of the work and were not caused by wilful misconduct. The controlling question is whether they were owing to the omission of some municipal duty, or, in other words, whether the city, through its representatives, was guilty of negligence, which includes want of skill whenever the exercise of skill is required by law. This question, for convenience, may be resolved into the following subordinate questions: 1. Whether the defendant was negligent in selecting an improper route or adopting an improper plan for the construction of the sewer. 2. Whether James J. Moran & Co. were independent contractors, as that phrase is known in law. 3. Whether said contractors, if not independent, were negligent in executing the work.

The city was not obliged, at its peril, to select the best possible route or to adopt the best possible plan, provided the route selected and the plan adopted were reasonably safe. While the statute which conferred the power did not provide that this particular sewer should be built in any particular street, it was without limitation, and, hence, the city had control of the method of making the improvement. The route and plan adopted promoted the interest of the public, but two experts called by the plaintiff testified, in view of what had happened and not in anticipation of what might happen, that construction by means of a tunnel would have caused less settling of the ground and less danger to abutting property than construction by an open trench. The city employed engineers conceded to be competent, who, after long and careful study of the subject, recommended the route and plan finally determined upon. That the route thus selected was a proper one, according to the evidence, does not admit of discussion.

The city was bound to exercise due care to see that the plan decided upon was reasonably safe, but its "rights were superior to those of persons engaged in work private in character." Atwater *v.* Trustees, *supra*. The plan adopted had been in general use for years. It was carefully prepared to protect both public and private interests. The tunnel plan, while safer in most respects, is dangerous to some extent, as well as more expensive. It causes less settling of the ground and prevents interference with travel, but inspection is more difficult and inferior work less apt to be

discovered. It was not in general use, for almost all sewers in this country, at the time the plan was adopted, were laid in open cuts. "The tunnel is the exception, not the rule." There are three methods of tunneling, known as the timber, shield and pilot systems. One of the plaintiff's experts condemned the timber method as dangerous at the place in question, and testified that the pilot system was the best, although he had never seen it in operation. The other expert sworn for the plaintiff also preferred the pilot system, but said that he had never used it, and that it was of recent origin. Even by the pilot system there are intervals of time when portions of the earth above are unsupported before the sustaining plates are put in, and, while the interval is short, subsidence of the soil may take place before the support is adjusted.

Engineering conditions required the sewer to be placed about thirty-five feet beneath the surface of the street in front of the plaintiff's property, which left insufficient lateral pressure of the soil to prevent undue vertical pressure upon the work of excavating a tunnel. A sewer only ten feet in diameter cannot be conveniently built by means of a tunnel, owing to the lack of room for workmen, and the city had never used that method under the circumstances named. The inconvenience of building a sewer but ten feet wide by the tunnel method was illustrated by actual experience on the work in question, as it was necessary for a part of the way to tunnel under a hill eighty feet high, yet the contractor testified that he asked and obtained permission from the city authorities to make a sewer twelve feet in width, without additional charge, although the contract called for one only ten feet wide. Even that tunnel, at that depth, caused some damage to abutting property, and it cost $58 more per running foot than where a cut was made.

Furthermore, there was a sewer in actual use twelve feet below the surface of the street, which, in case of leakage, might flood the tunnel and make it dangerous to adjacent property through settling of the moist soil. The city wished to remove that sewer from the street altogether, which would have been impossible except by the trench system. The presence of boulders in the soil made the tunnel plan less feasible than it otherwise would have been. The experience of the city was against it. No expert expressly condemned the plan adopted, and a large majority, including those of the highest standing and greatest experience, preferred it. The specifications made careful provision to protect the property of abutting owners by shoring, sheathing and otherwise, as well as to compel the contractors to make good any loss that might happen.

The fact that the engineers of the city expected there would be

some damage to sidewalks and stoops before they adopted the plan does not show that it was defective, because some damage would have resulted from any plan. Consequential damages, more or less serious, naturally result from making extensive improvements in a public street occupied with dwellings standing upon either side. The city, however, is not liable therefor at common law so long as they are confined to consequences that are the necessary and usual result of the proper exercise of the power to make the improvement. A change of grade may leave some houses too high and others too low, either to look well or to be conveniently used with reference to the street, yet even if the change is such as to endanger their stability, the city is not responsible at common law, although the subject has been regulated by statute to some extent in certain cities. Radcliffe *v.* Mayor, *supra.* As was said in Atwater *v.* Trustees, *supra,* which is an instructive case, "serious injury to property may be occasioned by the lawful exercise of powers of public character pursuant to law, and if the work is carefully and skillfully performed the consequences may be *damnum absque injuria* when the legislature has provided for no compensation. In such case the protection of the owner of property not taken or appropriated, which may be subjected to hazard or injury, is in the care and skill to be observed by those engaged in the execution of the work. If they fail to do that they are liable for the consequences of such failure."

We think the evidence before us, even with every permissible inference drawn in favor of the plaintiff, would not permit a jury to find that the plan of construction was not reasonably safe. While some facts bearing on the principal question were in controversy, the uncontradicted evidence, when considered in connection with those facts, assuming them to be found according to the plaintiff's theory, left no question of fact as to the reasonable safety of the plan.

When a municipal corporation furnishes its own materials and makes a public improvement through agents selected by itself, with power to discharge them at will and to direct them as to details of the work, they are its servants, and the master who selects and controls them is liable for their negligence. They are, so to speak. the hands and arms of the city, to do its will, as the hands and arms of a man do his will.

When, however, the city has power to let the work and it enters into contract with competent contractors, doing an independent business, who agree to furnish the necessary materials and labor and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, they are not

the servants or agents of the city, but are independent contractors, and the city is not liable for their negligence, even when it reserves the right to change, inspect and supervise to the extent necessary to produce the result intended by the contract, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers, which results in injury. Berg *v.* Parsons, 156 N. Y. 109; Engel *v.* Eureka Club, 137 N. Y. 100; Butler *v.* Townsend, 126 N. Y. 105; Charlock *v.* Freel, 125 N. Y. 357; Harrington *v.* Village of Lansingburg, 110 N. Y. 145; Ferguson *v.* Hubbell, 97 N. Y. 507; Town of Pierrepont *v.* Loveless, 72 N Y. 211; Kelly *v.* The Mayor, 11 N. Y. 432; Pack *v.* The Mayor, 8 N. Y. 222; Blake *v.* Ferris, 5 N. Y. 48: Reedie *v.* London, etc., R'y, 4 Exch. 244 (1); Overton *v.* Freeman, 21 L. J. C. P 52 (2). Independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not.

James J. Moran & Co., as competent contractors, undertook the independent business of building the sewer in question with their own materials and their own men, for, by specific agreement, they were to furnish both. They represented the will of the defendant as to the result of the work, but not as to the means of doing it. The men, the machinery and the details were all under their control. The city could not employ workmen for them nor direct the workmen employed by them. It could not select the tools and appliances to be used, nor require them to be used in any particular way or at any particular time. The will of the contractors, not of the city, controlled in these respects. While certain municipal officers could require the contractors to discharge incompetent workmen, that did

1. In Reedie *v.* London & North Western R'y Co., 4 Exch. 244, a railway company contracted, under seal, with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetency. The workmen in constructing a bridge over a public highway negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. *Held*, that the company was not liable, and that in such case the terms of the contract in question did not make any difference.

2. In Overton *v.* Freeman, 21 L. J. C. P. 52, 11 C. B. 867, it appeared that defendants were employed to pave a district by A. They contracted with B. to pave one of the streets. B.'s workmen, in the course of paving the street, left some stones at night in such a position as to constitute a public nuisance, and the plaintiff was injured by falling over those stones. No personal interference of the defendants with, or sanction of the work of, laying down the stones was proved. *Held*, that the defendants were not liable.

not make the workmen not discharged the servants of the city, nor empower it to fill the places of those discharged with men of its own selection. Stipulations to secure faithful compliance with the specifications on the part of the contractors do not make them servants of the city, as was held in Kelly *v.* The Mayor, *supra*, where the contract contained the following clause: "The whole work to be done under the direction and to the entire satisfaction of the commissioner of repairs and supplies, the superintendent of roads and the surveyor having charge of the work." The contractor in that case also "agreed to do the work, to take all necessary precautions for the prevention of accidents or injuries to persons or property, and to indemnify the corporation against all loss or damage by reason of any neglect or unskilfulness in its performance." The court said: "The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants; that he might make his own selection of workmen will not be denied. This right of selection lies at the foundation of the responsibility of a master or principal for the acts of his servant or agent. * * * As a general rule, certainly no one can be held responsible as principal who has not the right to choose the agent from whose act the injury flows. * * * The object of the clause relied upon was not to give to the commissioner of repairs and the other officer named the right to interfere with the workmen and direct them in detail how they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe what was to be done, but not how it was to be done nor who should do it."

So in Pack *v.* The Mayor, *supra*, the contract provided that the work was to be done according to certain specifications, and the contractor also agreed to "conform the work to such further directions as should be given by the street commissioner and one of the city surveyors," yet it was held that this was "nothing more than a stipulation for a change of the specification of the work, as stated in the contract, at fixed prices provided therein. It does not, as the court below held, make Riley the immediate servant of the defendants nor give to them any control over him as to the manner or otherwise in which he should conduct the blasting." See also Charlock *v.* Freel, 125 N. Y. 357, where the city reserved the right to "vary, extend or diminish the quantity of work during its progress," and authorized the engineer to fix the price of all work not included in the contract.

As was said by the learned Appellate Division, the "supervisory powers related to the character of the work performed for the then

city of Brooklyn and not to the relations of the contractors with third persons." Those relations were not interfered with by the city, which, however, made careful provision for the protection of abutting property by shoring it up, sheathing the trench and the like, but leaving to the contractors full control of the means and method of doing it. While the contract provided that it should be done, it did not provide how it should be done. "To make the city liable it must have the power to direct and control the manner of performing the very work in which the carelessness occurred." Vogel *v.* The Mayor, 92 N. Y. 10, 18.

James J. Moran & Co. were not servants employed in the business of a master and subject to his control as to all parts of the work, but were independent contractors engaged in making an entire improvement, free from control as to the manner of performance, although subject to instructions as to results. The plan was reasonably safe, the work was lawful, was not interfered with by the city to the injury of the plaintiff, and was not a nuisance when performed. We think the city was liable neither for the negligence of the contractors nor that of their agents or servants.

The contractors were, of course, liable for their own negligence, but the conclusion already reached makes it unnecessary to consider that subject upon this appeal.

The judgment should be affirmed, with costs.

PARKER, Ch. J.; O'BRIEN, BARTLETT, HAIGHT, MARTIN and LANDON, JJ., concur.

MONTGOMERY v. BUFFALO RAILWAY COMPANY.

Court of Appeals, New York, December, 1900.

STREET-RAILWAY COMPANY — RULES AND REGULATIONS. — A street railway has not only the right, but it is bound to make rules and regulations to insure the safe, effective and comfortable operation of its corporate business, and whether any particular rule is lawful and reasonable is a question of law for the court.

EJECTING PASSENGER FROM STREET CAR — RIDING ON PLATFORM — VIOLATION OF RULE. — A rule of a street-railway company that conductors on its street cars should "not allow passengers to sit, or stand on, or to crowd the rear platform" is a reasonable one, and if a passenger refuses to submit to such rule, the conductor may lawfully eject him from the car.

SICK PASSENGER NOT EXCUSED FROM VIOLATING RULE OF STREET-CAR COMPANY. — A passenger is not excused from violating a rule of a street-car company prohibiting him from riding on the platform of a car, merely because he was suffering from sick headache and expected to be affected actively by nausea at any moment, and has no sufficient reason in law for complaining because the conductor performed his duty in compelling him to leave the car for refusing to submit to the rule (1).

APPEAL from a judgment of the Appellate Division, Fourth Department, reversing a judgment in favor of the plaintiff. *Judgment affirmed.*

"This action was brought by the plaintiff against the defendant, a street-railway company, to recover damages for an assault and battery, alleged to have been committed upon him by a conductor in forcibly expelling him from a car. He had paid his fare, upon entering one of the defendant's cars, upon a connecting line, and, with a transfer ticket, got upon the car in question. He placed himself upon the rear platform and tendered his transfer ticket to the conductor. One of the company's rules provided that conductors should 'not allow passengers to sit, or stand on, or to crowd the rear platform, but will politely request them to take seats or to stand inside the car,' and the conductor, calling plaintiff's attention to it, directed him to go inside the car. The plaintiff declined to do so; stating that he had a sick headache, was nauseated and that he expected to be affected actively by the nausea at any moment. The conductor, however, insisted upon his compliance with the rule, and the plaintiff refusing compliance, the car was stopped and the plaintiff was ejected therefrom; but with no excessive force or physical injury.

"The defendant's motions for a nonsuit were denied and, at the conclusion of the trial, the jury returned a verdict in favor of the plaintiff for the sum of $60. Upon appeal to the Appellate Division, in the Fourth Department, the judgment recovered by the plaintiff was affirmed as to the facts, but it was reversed upon the law."

M. FILLMORE BROWN, for appellant.

PORTER NORTON, for respondent.

GRAY, J. — The company not only had the right, but it was bound, to make rules and regulations to insure the safe, effective and comfortable operation of its corporate business, and whether any particular rule is lawful and reasonable is a question of law for

1. For actions relating to Ejection of Passengers from Trains, Street Cars, Etc., from the earliest period to 1897, see vol. 8 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions to date on the same topic appear in vols. 1-9 AM. NEG. REP., and the current numbers of that series of REPORTS.

the court. The appellant concedes that the rule of the company was a reasonable one, and thus the question is whether, because it was enforced by the conductor in the expulsion of the plaintiff from the car, upon his refusal to submit to it, the company can now be made answerable in damages by reason of the conductor's action. The proposition would seem to furnish its own answer.

The appellant, however, insists that even if this rule was a reasonable regulation of the company, all rules, even if reasonable, "must have their exceptions," and whether it was reasonable to enforce the rule upon this occasion was a question to be passed upon by a jury. In other words, it is claimed that the right of enforcement may depend upon the particular circumstances, and, as the plaintiff had an excuse for non-compliance, in the present case, its reasonableness, or that of the conductor's conduct, became a question for the determination of the jury. I am unable to assent to the proposition. I think that if the rule was a reasonable one the passenger was bound to submit to it, and that it was the duty of the conductor to enforce it. Therefore, in ejecting him from the car upon his refusal to submit, the conductor was acting lawfully in the discharge of his duty. The passenger, by his conduct, had forfeited his right to be carried any further. In Hibbard *v.* R. R. Co., 15 N. Y. 455 (1), an early and leading case, the question was fully discussed and its doctrine has been followed in this court. Pease *v.* R. R. Co, 101 N. Y. 367. Barker *v.* Central Park R. R. Co., 151 N. Y. 237, is a recent case, in which the right of the carrier to make and to enforce its reasonable rules is distinctly recognized. It might be observed that there is quite a difference between such a case as the appellant's counsel mentions, where a passenger is ejected for failure to produce his ticket upon the conductor's request, which another conductor had previously taken up and retained, and such a case as this. In the former case it could be argued, with more force, that the passenger's inability to comply with the conductor's request was caused by the mistake or fault of another of the company's servants, and the theory of the corporate liability would be rested upon different propositions.

A railway company is not obliged to carry persons unless they are willing to submit to, and to be bound by, the reasonable rules and regulations which it has established. The plaintiff, if in the physical condition described by him upon the day in question, was not obliged to travel upon the defendant's street car; but if he chose to do so he was bound to submit to its regulations. He has no

1. Hibbard *v.* N. Y. & Erie R. R. Co., 15 N. Y. 455, is reported in 8 Am. Neg. Cas. 516.

sufficient reason in law for complaining because the conductor performed his duty and compelled him to leave the car.

I think the order and judgment were right and should be affirmed, with costs.

PARKER, Ch. J.; O'BRIEN, LANDON and WERNER, JJ., concur; HAIGHT and CULLEN, JJ., not voting.

Order and judgment affirmed.

SMITH v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Court of Appeals, New York, November, 1900.

EMPLOYEE INJURED BY BREAK IN APPLIANCE — LATENT DEFECT — MASTER NOT LIABLE. — In an action to recover damages for injuries sustained by plaintiff, a blacksmith in defendant's employment, caused by the breaking of a ring in a chain which was one of the appliances used in defendant's work, it was held that the defendant was not liable where it appeared, without dispute, that the ring broke because subjected to an unusual strain; that it was manufactured out of proper material and made by competent and skilled workmen; that if there was any defect in the appliance it was a concealed defect; that inspection was made by competent men and that such inspections were frequent and thorough (1).

APPEAL from a judgment of the Appellate Division, Fourth Department, affirming a judgment entered on the verdict of a jury in favor of the plaintiff. *Judgment reversed.*

CHARLES A. POOLEY, for appellant.

MORRIS COHN, JR., for respondent.

O'BRIEN, J. — The plaintiff recovered a verdict in this action for $10,800 for injuries, consisting of a broken ankle and various bruises, while engaged in the defendant's services as a blacksmith. The broken ankle is a permanent disability. The others were temporary, and, though painful for a time, have been substantially healed. The accident resulting in the injury occurred on the 28th day of July, 1895. It was caused by the breaking of a ring in a chain which was one of the appliances used in the job upon which the plaintiff was then engaged. There is no substantial dispute as to the cause of the accident, or as to the manner in which it occurred. Both sides state the facts in the same way and substantially as follows: At

1. For actions relating to Accidents Caused by Defective Appliances, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Spuyten Duyvil the defendant has a drawbridge over the creek. When vessels are passing the bridge is hauled up from a horizontal to a perpendicular position, and stands against the towers which contain the appliances for opening it. These towers are about seventy-five feet high, and are provided with several weights, equal in all to the weight of the bridge, and an engine about half way up, which regulates the raising and lowering of the bridge. These weights are attached to a heavy wire cable extending from the weights to the further end of the bridge, so that as the bridge raises the weights lower. The wire cable passes through all the weights and is made fast to the bottom one by splaying out the strands of wire on the under side of the weight and then pouring in babbit metal to fill the hole and hold the metal.

The wire cable had become worn by use and it was determined to replace it with a new one. In order to remove the old cable the bridge gang had securely blocked up the weights at the top of the tower, and had cut off the cable, leaving the stub end in the lowest weight, and had then rigged a chain about the timber at the top of the tower, and a pulley block and fall attached to the weight, and lowered the weight to the ground. This was done one evening, and after melting out the babbit metal the weight was brought again to the tower, and the same rigging which had been used to lower it, and which had remained where it was over night, was again attached to the weight, and they proceeded to hoist the weight back to its place. The foreman stood at the hoisting engine standing on the ground near the foot of the tower, and as the weight began to lift it became caught under a timber of the tower, so that it had to be dislodged. The foreman called plaintiff to dislodge it and guide the weight from under the timber, and then told him to get upon it and ride it up so as to keep it clear from other projecting timbers of the tower. The plaintiff mounted it and rode up about thirty feet, when the plaintiff says the weight must have caught on a beam, and the ring of the chain at the top of the tower broke, precipitating the plaintiff and the weight to the ground, resulting in the injury complained of. The weight was three feet long, twenty inches wide and sixteen inches thick, and in raising it it was so fastened to the fall that the plaintiff could stand upon the flat surface.

The gang of men that the plaintiff worked with was called the bridge gang, and they had been furnished with every appliance necessary for the performance of the work. The plaintiff was attached to this gang as the blacksmith, in which capacity he had been in defendant's service for five years prior to the accident. The ring in question had been in use about two years. It was made of the

best material by competent and skilled workmen and had been inspected by competent men several times during the period it was in use, when proper tests were applied to discover any flaw or defect in the iron, and had been examined before use on this occasion. It broke because subjected to an unusual strain, due to the circumstance that the weight was caught under the timbers of the tower.

The court charged the jury that it appeared without dispute in the evidence that the material furnished by the master for the manufacture of the ring, and out of which it was made, was proper material; that there was nothing in its appearance to indicate inefficiency, and that it was made by competent and skilled workmen. There was some proof given by the plaintiff tending to show a concealed defect in the iron of the ring at the place where it broke, due to the presence of dirt or sulphur, or both, within the body of the metal. The weld of the ring made by the workman did not part, but the metal broke in such a manner as to leave part of the weld on either end of the break.

The only question submitted to the jury, as I understand the charge, was whether this concealed defect, if it existed, could have been discovered by the workman who made the ring, in the exercise of ordinary care, and possibly the other question, whether there was proper inspection of the chain and ring while in use. The defendant's counsel at the close of the plaintiff's case moved for a nonsuit on various grounds, and among others that there was no proof of negligence on the part of the defendant to which the accident could be attributed. The same motion was renewed at the close of the whole case, and in both instances denied and an exception taken.

It seems to have been assumed by the court and by counsel on both sides that if there was any defect in the iron at all it was a concealed defect, and the proof to that effect was undisputed. There is no dispute in the evidence that the inspection was made by competent men in the defendant's employ and that the inspection was frequent and thorough and of such a character as to reveal any flaw or defect in the iron that could be discovered in that way. There is no basis in the proof for imputing negligence to the defendant for omission to cause the chain to be inspected in a reasonable and proper manner, and the court having instructed the jury, as we have seen, that there was nothing in the appearance of the iron from which the ring was made to indicate any defect and that the workman employed to make it was competent and skilful, it is difficult to see how the jury could have found that the defendant was negligent in not discovering the defect if it existed. The facts which the learned judge in his charge assumed as established by the

undisputed proof really acquitted the defendant of the charge of negligence. De Graff *v.* N. Y. C. R. R. Co., 76 N. Y. 125; Burke *v.* Witherbee, 98 N. Y. 562; Cahill *v.* Hilton, 106 N. Y. 512; Flood *v.* Telegraph Co., 131 N. Y. 603; Probst *v.* Delemater, 100 N. Y. 266; Hart *v.* Naumberg, 123 N. Y. 641; Kern *v.* De Castro Refining Co., 125 N. Y. 50; Cregan *v.* Marston, 126 N. Y. 568; Carlson *v.* P. B. Co., 132 N. Y. 273; Harley *v.* Buffalo Car Co., 142 N. Y. 31.

But if this was a much stronger case on the merits than it evidently is we would be obliged to reverse the judgment upon exceptions to rulings at the trial.

1. The court admitted proof by the plaintiff, under defendant's exception, to show that the person in charge of the engine on the day of the accident and another person who had charge of the engine generally, but was absent on the day of the accident, were not licensed engineers under chapter 643 of the Laws of 1886, sec. 311. That statute does not make the license proof of the engineer's competency in an action of negligence against the master, nor does the absence of a license in such a case show that he was incompetent. Common-law proof may be given of that fact when in issue. Both of these persons had been in the service of the defendant many years in the same capacity, and there was no proof tending to show that either was not in fact a competent engineer. Moreover, it was not alleged or claimed that the accident was in any degree to be attributed to the conduct of the engineer, but solely to the breaking of the ring. In fact, the court refused to submit any such question to the jury. The testimony, however, remained in the case, and was calculated to mislead the jury in considering the two questions that were submitted. They might very well conclude that they were at liberty to pass upon any question in the case within the range of the testimony.

2. The plaintiff's counsel propounded to a physician called to describe the extent of the injury the following question: "State the comparative use that he would have of his present foot and an artificial foot?" The question was objected to as incompetent, but the objection was overruled and an exception taken. The witness answered that the plaintiff could get around better and be more useful with an artificial foot. The question of damages was, of course, submitted to the jury, and this ruling, instead of confining them to the injury as it was, permitted them to speculate upon the plaintiff's condition after the foot was amputated and replaced by an artificial one. The testimony was prejudicial to the defendant, since it had a tendency to confuse and mislead the jury. As it remained in the case without any explanation by the court they

might very well have assumed that they were at liberty to award as part of the damages compensation to the plaintiff for the pain and danger of amputation, as well as the expense of supplying himself in the future with the artificial foot, a consequence which it was not claimed would follow as the natural or necessary result of the injury.

3. There were several other exceptions in the record to the admission of proof concerning the conduct and statements of the plaintiff's co-servants engaged with him in raising the bridge at the time of the accident. The court, in the charge, eliminated from the case all questions of negligence on the part of the defendant arising from the selection, employment or retention of these co-servants, and no such question was submitted to the jury, but the testimony referred to remained in the case without note or comment, and it is quite impossible to say how far it influenced the jury as to the result, if at all, and since they may all be obviated upon another trial it is not needful to consider them. The judgment entered upon the verdict was affirmed by a divided court, and hence, the sufficiency of the proof to establish the cause of action is open to review in this court, or, more properly, the question whether there is any evidence at all tending to sustain the allegation of negligence. The plaintiff, no doubt, sustained a very severe injury, which might well appeal to the justice and sympathy of the master, but unless the record is materially changed upon another trial there is no basis for a legal liability on the part of the defendant, since it is not chargeable with negligence upon the proof now before us.

The judgment should be reversed and a new trial granted; costs to abide the event.

LANDON, J., concurs; PARKER, Ch. J.; HAIGHT, MARTIN and VANN, JJ., concur on the ground that there was not sufficient evidence to go to the jury; BARTLETT, J., concurs in result.

Judgment reversed, etc.

STEWART v. FERGUSON (1).

Court of Appeals, New York, November, 1900.

EMPLOYEE KILLED BY FALL OF SCAFFOLD — PRESUMPTION OF NEGLIGENCE — INSTRUCTIONS — APPEAL. — In an action to recover damages for injuries resulting in the death of plaintiff's intestate caused by the fall of a scaffold while at work for defendant, the trial court refused to charge that the happening of the accident created no presumption of negligence on the part of the defendant, but charged that the fall of the scaffold raised such a presumption. The charge was not excepted to but the refusal to charge was. *Held*, that, on appeal, both charge and refusal may be considered, because the charge made the refusal more pointed and impressive (2).

CONSTRUCTION OF SCAFFOLD — STATUTORY REQUIREMENT — LABOR LAW. — The fall of a scaffold bearing only the weight usually required in the performance of the labor for which it was an appliance is *prima facie* evidence of negligence under the New York Labor Law (Laws 1897, c. 415, secs. 18, 19), which provides that a person employing another to perform labor of any kind in the erection of a building shall furnish safe scaffolding and proper appliances for such work, the scaffolding to be so constructed as to bear four times the maximum weight required to be placed thereon when in use.

APPEAL from Supreme Court, Appellate Division, First Department.

Action by Thomas C. Stewart, administrator, against John W. Ferguson. From a judgment of the Appellate Division affirming a judgment in favor of the plaintiff (65 N. Y. Supp 149, 8 Am. Neg. Rep. 444 n), defendant appeals. *Judgment affirmed.*

"The action was brought to recover damages for alleged negligence causing the death of Andrew C. Stewart, the plaintiff's intestate, on November 23, 1897. Stewart was in the employ of defendant, and, while engaged in laying brick in the wall of a building which the defendant was erecting in Long Island City, the scaffold upon which he was standing, which the defendant had caused to be erected for the purpose, fell, and caused his death."

JOHN V. BOUVIER, JR., for appellant.

EDWARD P. LYON, for respondent.

1. Affirming same case, 8 Am. Neg. Rep. 444 n., 65 N. Y Supp. 149, 52 App. Div. 317.

2. For other actions relating to Injuries Arising out of Collapse of Scaffolding, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

See also Pursley *v.* Edgemoor Bridge Works (N. Y. App. Div.), case next reported.

LANDON, J. (after stating the facts.) — The only question of law presented for our review by the exceptions arises upon the refusal of the trial court to charge as requested by the defendant. There was evidence tending to show how the scaffold was constructed, but not tending to show any particular structural weakness. There was no evidence tending to prove the cause of the fall of the scaffold other than the fall itself. The trial court instructed the jury that the falling of the scaffold raised a presumption of the negligence of the defendant in its construction, and he refused to charge that the happening of the accident created no presumption of negligence on the part of the defendant. The charge was not excepted to, but the refusal was; but both charge and refusal may be considered, because the charge made the refusal more pointed and impressive. Before the passage of the labor law (ch. 415, Laws 1897), it had been held that the falling of a scaffold without any apparent cause was *prima facie* evidence of negligence on the part of the person bound to provide it. Green *v.* Banta, 48 N. Y. Super. Ct. 156, affirmed in 97 N. Y. 627; Solarz *v.* Railway Co., 8 Misc. Rep. 656, 29 N. Y. Supp. 1123, affirmed on appeal 11 Misc. Rep. 715, 23 N. Y. Supp. 1149, and 155 N. Y. 645, 49 N. E. Rep. 1104. These cases proceeded upon the theory that, if the scaffold had been properly constructed, in the absence of other ascertained cause of its fall, negligence in its construction or maintenance might be presumed. In Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. Rep. 1017, the negligent act which caused the fall of the scaffold was ascertained, and the question in controversy was whether it was the negligence of the master or of his servants. The court held that the scaffold was not a place in which to perform labor, but an appliance for use in its performance, and therefore the master's duty was that which he owed his servants in respect of appliances, and not of places; and that his duty to his servants was performed in respect of the scaffold by furnishing proper materials for its construction, and competent workmen to construct it; and that he could commit the details of its construction to such servants; and that their negligence in the execution of these details resulting in an injury to a fellow-servant was not the master's negligence. In Kimmer *v.* Weber, 151 N. Y. 417, 1 Am. Neg. Rep. 156, 45 N. E. Rep. 860, a scaffold fell, and the same rule was applied. Assuming the law to be as stated in the two classes of cases, the case before us falls within the class in which no other cause of the fall of the scaffold was ascertained except as inferred from the fall itself, and not within the class in which it was otherwise ascertained. But, if within the latter class, then we think sections 18 and 19 of the labor

law enlarge the duty of the master or employer, and extend it to responsibility for the safety of the scaffold itself, and thus for the want of care in the details of its construction. These sections provide.

"Sec. 18. Scaffolding for use of employees. A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.

"Sec. 19. All swinging and stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon, when in use," etc.

This section differs from section 1, ch. 314, Laws 1885, in this respect: That section provides for the punishment of knowingly or negligently doing the acts mentioned in this section. This section omits the words "knowingly or negligently," and declares that the acts shall not be done. The plaintiff would have to prove either knowledge or actual negligence under the earlier act, and the defendant, no doubt, could invoke for his protection upon the charge of negligence the distinction between his negligence and that of his servants, as laid down in the case of Butler *v.* Townsend, *supra.* This probably explains why the earlier act was not noticed in Butler *v.* Townsend, Kimmer *v.* Weber, *supra*, and in the cases in the Appellate Division cited by the appellant. Section 18 is a positive prohibition laid upon the master without exception upon account of his ignorance or the carelessness of his servants. The evidence tended to show that this scaffold was not overloaded, but was bearing the weight usually required in the performance of the labor for which it was an appliance. *Prima facie* it was so constructed as to bear less than one-fourth the weight required by sec. 19. Its fall, in the absence of evidence of other producing cause, points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty which usually tends to produce conviction in the mind in tracing events back to their causes. It is circumstantial evidence, and, if it does convince the jury, it justifies their verdict. The judgment should be affirmed, with costs.

PARKER, Ch.J., and O'BRIEN, BARTLETT, MARTIN, and VANN, JJ., concur. HAIGHT, J., concurs in result.

PURSLEY, ADM'X, v. EDGEMOOR BRIDGE WORKS.

Supreme Court, New York, Appellate Division, First Department, January, 1901.

EMPLOYEE KILLED BY COLLAPSE OF BRIDGE SCAFFOLD—DEFECTS — DUTY OF MASTER. — In an action to recover damages for the death of plaintiff's intestate while in defendant's employ, caused by the collapse of a scaffold erected for bridge construction, due to omission of certain braces and weakness of the piling, it was held that these defects were not a mere detail of the work entrusted to a fellow-workman for which the master was not responsible, as the latter was bound to exercise care in erecting the scaffold structure on or about which his employees were to work (1).

INGRAHAM, J., *dissented.*

EXPERT EVIDENCE. — In such action it was held that where it is not certain that a person not versed in the science and art of construction, after a detailed statement of the facts showing the manner of construction, could form an adequate judgment as to whether a scaffold structure was safe, the opinions of experts on the subject, though involving the statement of a conclusion, were competent.

MCLAUGHLIN, J., *dissented.*

NEGLIGENCE FOR JURY. — In such action it was held that the questions of negligence and contributory negligence were properly for the jury, under the authority of Davidson *v.* Cornell, 132 N. Y. 228.

APPEAL from judgment entered on verdict of a jury and from order denying motion for a new trial. *Judgment affirmed.*

"The action was brought to recover damages for the death of plaintiff's intestate, who was employed by the defendant, the Edgemoor Bridge Works, and was killed on April 11, 1899, by the collapse of a scaffold structure erected in the Harlem river. The theory of the complaint is that the defendant had negligently failed to provide a safe and suitable place for the plaintiff's intestate to work.

"There is practically no dispute as to the method of construction adopted in the erection of the scaffold, the case turning upon whether such method was reasonably safe. The defendant, it appears, was under contract to erect a steel bridge across the Harlem river, and stone piers were built, between which temporary

1. For other actions relating to Scaffold Accidents, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS. See also Stewart *v.* Ferguson, 164 N. Y. 553, preceding case reported.

scaffolds were constructed intended to support the steel girders, etc., and thereafter to be removed. Between the stone piers numbered six and seven, nine rows of piles parallel with the piers, seven to nine in a row, had been driven into the bed of the river. The piles were driven almost vertically, and their tops were then forced as nearly as possible into line, and upon them were placed two timbers, known as pile caps, which were bolted together and into the piles, thus forming a pile bent. At right angles to these pile caps were laid timbers longitudinally, called stringers, bolted to the pile caps and connecting the pile bents. There were three of these longitudinal timbers or stringers between each two bents, and the first bent from pier seven was connected to the pier by stringers to a permanent bulkhead at the base of the pier. Upon each transverse pile bent were placed uprights, and on their tops was another cap or timber, there being cleats or scabs fastened to the uprights and to the cross timbers or caps above to keep the uprights in place. The uprights appear to have merely rested on the beam below. Above the upper caps on the uprights, upper longitudinal timbers or stringers were laid, bolted to the caps and connecting the uprights of each bent. On top of the upper stringers tracks were placed on which ran a traveler or crane weighing thirty tons, which was used for hoisting timbers from below, and particularly for raising the upper bents, consisting of uprights with their caps bolted to them.

"In addition crossbeams or braces were placed between the bents upper and lower, which were intended to strengthen the scaffold. These braces comprised "sway braces," which ran transversely, and "X-braces," which ran longitudinally to the structure. At the time of the accident X-braces had been provided for the bents near pier seven, but not for the seventh, eighth and ninth bents, and the traveler was resting above these latter bents. It had been gradually pushed along as the structure grew, and was made to rest upon uncompleted scaffolding. It was not, however, in actual use when the accident happened.

"At that time the plaintiff's intestate, who had some experience in bridge and scaffold building, was at work in a boat below the traveler. He had been sawing piles off evenly and securing sash braces between them below the high-water line. There is no evidence that he had anything to do with the upper structure or knew that X-braces had not been provided for the last three bents.

"The defendant sought to explain the accident by showing that just prior thereto some workmen had drawn bolts from the stringers, thus breaking the chain of beams which reached back to the bulkhead. To rebut this the plaintiff introduced evidence that these

workmen had denied having drawn any bolts. The plaintiff claimed that the proximate cause of the accident was faulty construction of the scaffold because the piles were not properly driven and it was necessary to force them into line and because X-braces and cleats were not provided for the bents above which the traveler rested.

"At the conclusion of the case the issues were submitted to the jury upon a charge and written communication which stated: 'The plaintiff alleges that the structure fell because of some defect in the piles themselves, in number or arrangement of them, or because of the lack or insufficiency of bracing, or because the uprights were not fastened to the pile caps, sometimes called sills beams, or because the derrick was too heavy for the structure to bear, or because of some, any or all of the above mentioned reasons'

"The jury returned a sealed verdict in favor of the plaintiff for $4,000, and from the judgment entered thereon and from order denying motion for a new trial the defendant appeals."

CARL A. DE GERSDORFF, for appellant.

THOMAS P. WICKES, for respondent.

O'BRIEN, J. — The defendant upon this appeal contends that the judgment should be reversed because, 1, there was no competent evidence that the defendants had not exercised reasonable care to insure the safety of the structure or that the accident was caused by its negligence; 2, the opinion evidence to the effect that the structure was unsafe was inadmissible; 3, the plaintiff's intestate was himself engaged in erecting that part of the structure which fell, had full knowledge of any defects which existed and took the risk thereof; and, 4, if there is any negligence in running the traveler out over the last bents without X-braces and cleats, it was negligence in a detail of work for which defendant is not liable to an employee injured thereby.

The contentions presented involve not only the usual questions of defendant's negligence and plaintiff's freedom from contributory negligence, but, if these are resolved favorably to plaintiff, there are still the additional questions, whether the collapse of the structure was a risk which the workman assumed and whether it was caused by the negligence of a co-employee in performing a detail of work intrusted to him, for which negligence the master is not responsible. Whether the plaintiff, who was himself engaged in completing a part of the scaffold which fell, had knowledge of existing defects, was, we think, properly submitted to the jury as a question of fact. The risks which he assumed were only those apparent to observation or which, from the character of the structure, he was bound to observe and know. And, as well expressed

in the headnote in the case of Davidson *v.* Cornell, 132 N. Y. 228, "Where, however, although the defect is apparent, it may require skill and judgment not possessed by ordinary observers or by the servant to give knowledge of hazards which may be apprehended therefrom, he does not assume those hazards." Here the plaintiff's intestate was an efficient laborer, but it does not appear that he was familiar with principles and methods of construction, and, not being thus skilled, he could not be charged, as matter of law, with knowledge of the condition of the piles, which for the most part were concealed in water and earth, and with driving which he had nothing to do; nor with knowledge of the effect of the presence or absence of particular braces in the superstructure.

Nor do we think, if the causes assigned by plaintiff for the accident — which we will hereafter discuss — were the true and proximate causes, that these were a mere detail of the work intrusted to a fellow-workman for which the master is not responsible. The latter was bound to exercise care in erecting the structure on or about which the employees were to work. We do not mean to be understood that in some cases the master may not employ persons, as in a hazardous undertaking, and escape liability for injuries resulting from the incidental risks; but our remarks are addressed to the particular structure here in question, which was not inherently dangerous and which if properly erected would at all times have provided a place to work in which the employees would be reasonably safe. This duty of providing a place reasonably safe was imposed upon the defendant and could not be delegated.

Passing from the consideration of assumed risk and contributory negligence and negligence of fellow-workmen, we are brought to what we think is the real and most difficult subject before us, namely, whether there was sufficient and competent proof given at the trial to justify the submission to the jury of the question of defendant's negligence. The latter's theory of the cause — that it was due to workmen who drew certain bolts — was met by opposing evidence, and this question was properly submitted to the jury. The respondent insists that the verdict which found defendant negligent may be supported by the doctrine of *res ipsa loquitur* or by the failure of defendant to comply with the provisions of Chap. 415 of the Laws of 1897, which impose upon a master liability for neglect in constructing an unsafe scaffold. We think, however, that the statute which gives a remedy against the master in favor of an employee who is injured while working on a scaffold by reason of some defect therein, has reference to a completed scaffold; and for a similar reason we think that the doctrine of *res ipsa loquitur* does not apply,

because this scaffold was in course of erection, and from the mere falling of part of it alone the inference of negligence cannot be drawn.

We must consider, therefore, the specific grounds of negligence alleged in the complaint or upon which proof was given at the trial, and from these conclude favorably or unfavorably to the appellant. As correctly summarized by the appellant: "The negligence particularly specified in the complaint, and which the plaintiff attempted to prove on the trial, was that the traveler ought not to have been run out upon the seventh, eighth and ninth bents," because the piles upon which the false work was supported were too weak for the purpose for which they were used and were improperly driven, and because insufficient cross or X-braces were used to connect the different bents, and the upper portion of each bent was insecurely fastened on the pile cap with cleats or scabs. In addition to such charges of negligence there was testimony given at the trial that, at the time "and a day or two before the accident, there was not timber there for the X-braces." There is other evidence in the case that the timber was there, so upon this point a disputed question of fact arose. Whether defendant was negligent in not providing material suitable for X-braces was not submitted to the jury, the court limiting the negligence to the other charges above enumerated; and we may, therefore, dismiss the question of whether or not sufficient and proper timber was supplied by the defendant from further consideration. So with respect to defective plans. Though such defect was alleged in the complaint and referred to on the trial, the questions relating thereto were, on plaintiff's request, withdrawn from the consideration of the jury.

Upon the question of whether the piles were sufficient for their purpose, it is admitted that they were not exactly plumb, and that the heads of some of them were pulled by lines from an engine into place in order to make a straight row upon which to bolt the pile caps; and it appears that after the accident the piles which were under the traveler were found broken off short at the river bed. The principal evidence relating to the piles was given by experts, one of whom, Mr. Tate, was superintendent for defendant Rodgers, and, on examination by plaintiff's counsel, stated that "these piles were driven * * * in the usual and ordinary way * * * in a workmanlike and proper manner," and "the piles were sufficient to support the weight of the false work and traveler." This was nothing more or less than the opinion of an expert, which was the same kind of evidence that appellant insists it was error to admit. Objection was made to the expression of opinion by the other

expert, Mr. Joyce, as to the safety of the piles for their purpose. This is not necessarily inconsistent, however, for the defendant had the right to object to plaintiff's using such evidence, and, when it was allowed, without waiving the exception to its competency, could rely upon like evidence.

The first of this opinion evidence was brought out by defendant's counsel in examining Mr. Rodgers, the contractor for the pile work, who stated, in answer to question, that from his large experience "such piles as he saw were driven in a proper and workmanlike manner." Opposed to this evidence is the testimony of Mr. Joyce, who, as well as Mr. Tate, was skilled in bridge and scaffold building, and worked on the structure in question. He testified that Mr. Mahon, who inspected the piles, had asked him to see the piles driven and to give his opinion, and he told Mr. Mahon that they were not driven properly, exception being taken to the admission of this statement. He then testified that the drop of the hammer on the piles was ten to twelve feet, and the piles went, under each of the final blows, from nine to ten inches. When asked what that indicated, he answered that the pile was too short. A motion was made to strike out the answer which was denied. To the further statement that the usual distance to drop the hammer was at least thirty feet, exception was taken. He was then asked whether, as an experienced pile driver, the piles in his opinion were solid enough to construct upon; and, under exception, he answered that they were not.

The appellant further objects that the testimony of Mr. Joyce referred to piles which, as matter of fact, did not figure in the accident because they were not under that part of the structure which fell; but the plaintiff could not be expected to give evidence as to the way in which each pile was driven. The method of driving the piles was determined when such work was begun, and it does not appear that, after the first piles mentioned were driven, any material change was made in their selection or the manner of driving them. There is in evidence a letter from Mr. Rodgers directed to the defendant, and written before the accident, to the effect that "Mr. Tate is of the opinion that the piles fifty-five feet long, as arranged for, are too short, and is fearful that they are not solid enough to construct upon; that they are now driving two extra piles under each bent for the purpose of adding strength to it. We can get piles seventy feet to seventy-five feet long * * *." This letter, it seems, also referred to piles near pier seven; but another letter written by Mr. Headrick, who was in charge of the work for defendants, indicated that thereafter little change was made. It is as

follows: "I authorized Rodgers to drive piles as mentioned in one bent only."

The introduction of these letters was objected to as irrelevant only, and we think the court was correct in holding that it would admit them "as evidence of notice to the defendants of the facts stated * * * but not as evidence of the truth of these facts. You must prove that the facts actually existed." This burden the plaintiff subsequently undertook to prove, and thereafter, upon the question of notice merely, the letters were admitted.

Upon the subject of insufficient bracing and support of the structure by cleats, the main facts are admitted, *i. e.*, that there were no cross or X-braces between the last three bents at the time of the accident, nor cleats. And it is admitted, also, that the traveler or crane, weighing thirty tons, was directly over such bents. Aside from the X-braces and cleats, it appears that sway or transverse braces had been provided, and that the stringers had been bolted to each other, and the appellant contends that the structure thus built was sufficient to sustain the weight and strain to which it was subjected, and that the absence of the X-braces and cleats had nothing to do with the accident, which was caused by the withdrawal of bolts from the stringers by some of the workmen. It was shown that the original plans did not call for longitudinal X-braces, which were ordered as a precaution by the engineer in charge, and it is urged that the X-braces were merely to provide against a lateral thrust, presumably from the exterior, and not to sustain vertical weight. In opposition, it is insisted by the respondent that without X-braces and cleats the use or presence of the crane on top of the scaffold would make and render the structure unsafe.

The witness Joyce, whose testimony as to the piles has been referred to, testified, in reference to the erection of the superstructure, that the ninth, eighth, and seventh bents or sections which fell had no X-braces or cleats, and that the traveler "was sent ahead out towards the middle of the river before the bracing was done underneath." He was then asked whether in his opinion the ninth, eighth, and seventh bents were reasonably safe without the X-braces and without the cleats which he had described. Objection to this question was overruled, and the witness answered, under exception, that they were not safe. The next question was: "In what manner ought the structure to be constructed before the crane was put on?" and exception was taken. The question was limited to the three bents, seventh, eighth, and ninth, and the answer was: "Those scabs ought to have been on, and those X-braces ought to have been on from one bent to another to secure them in position

and hold them." Asked if he knew what caused the collapse, he replied that he "could not answer either way."

Thomas W. Hildebrand also testified for plaintiff that he had been at work as a bridge builder twelve or thirteen years, and worked on the scaffold here in question, and that when the accident occurred there were no upper or lower X-braces between the sixth and seventh, seventh and eighth, and eighth and ninth bents, from one bent to another, and the traveler was on the bents that fell, chained down to the sixth with the front end out near the ninth. He was then asked: "Was it usual to put on a traveler of this kind and stand it over bents that were not X-braced one with another, and that did not have X-bracing between the legs of the bents and the sills on which they rested?" and answered, under exception, "No, sir." The next question was whether that was a reasonably safe way of constructing such false work, and he answered, under exception, that it was not. It will thus be seen that the method of construction adopted was safe and proper depended to a large extent on expert evidence, and we are thus brought to a consideration of whether or not such evidence was competent.

Opinions of experts may not be given if the facts on which they are based are such that men of ordinary experience and intelligence can draw the inferences therefrom without such aid. In Chase's Stephens' Digest of the Law of Evidence we find a summary taken from the case of Harley *v.* Buffalo Car Co., 142 N. Y. 31, as follows: "A, an employee in B's machine shop, was injured by the breaking of a belt used to move machinery. The belt was fastened with a belt fastener which gave way. A sued B for damages for this injury, alleging negligence. At the trial experts in the use of belts and fasteners were asked to state their opinion as to the safety and fitness of the kind of belt fasteners which caused A's injury. This evidence was deemed to be irrelevant. The main question at issue was whether the fastener was suitable and safe, and this should be determined by the jury and not by the opinions of experts."

This rule is expressed in Van Wycklen *v.* City of Brooklyn, 118 N. Y. 424, wherein it was said, as stated in the head note: "The opinion of a witness upon a precise question the jury is to determine is only competent when from the nature of the case the facts cannot be stated or described to the jury in such manner as to enable them to form an adequate judgment, and no better evidence than such opinions is attainable." And in Transportation Line *v.* Hope, 95 U. S. 297, the rule was well stated as follows: "It is upon subjects of which the jury are not as well able to judge for themselves as is the witness, that an expert as such is expected to testify.

Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases "

The most recent expression of the highest court of the State upon this subject is to be found in the case of Dougherty *v.* Milliken, 163 N. Y. 527, wherein it is said (p. 533): "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in such cases, the jury with all the facts before them can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts, but the conclusions to which they lead, may be testified to by experts. The distinction between these two kinds is apparent. In the one instance the facts are to be stated by the experts and the conclusion is to be drawn by the jury; in the other the expert states the facts and gives his conclusion in the form of an opinion, which may be accepted or rejected by the jury.

"The next step in the logical development of this inquiry is to ascertain to which of these two classes the case at bar belongs. If the knowledge of the experts consists in descriptive facts which can be intelligently communicated to others not familiar with the subject, the case belongs to the first class. If the subject is one as to which expert skill or knowledge can be communicated to others not versed in the particular science or art only in the form of reasons, arguments or opinions, then it belongs to the second class. Ferguson *v.* Hubbell, 97 N. Y. 507; Roberts *v.* N. Y. El. R. R. Co., 128 N Y. 455; Schneider *v.* Second Ave. R. R. Co., 133 N. Y. 583; Parish *v.* Baird, 160 N. Y. 302, 6 Am. Neg. Rep. 666; Van Wycklen *v.* Brooklyn, 118 N. Y. 432; Schwanser *v.* Birge, 46 Hun, 66."

Following the rules thus given for our guidance, the question presented is, In which of the two classes defined must the evidence objected to be placed? If in the first, requiring that the testimony should relate only to facts, then it was error to admit the opinions of experts which involved conclusions from facts; if in the second, which permits such opinions to be given, the exceptions are untenable. As stated, the opinions given related to the safety of the

piles driven and to the safety of the scaffold without X-braces and cleats. Upon the first subject, the expert had testified that the hammer fell ten instead of thirty feet, and that at the final blows the piles went under nine or ten inches; and to further question he answered, under exception, that that would indicate that the piles were too short and were not safe to construct upon. The conclusion thus expressed was, we think, one which a layman, unskilled in pile driving, could not draw from the facts stated. A man of ordinary experience and intelligence could not form an adequate judgment whether piles which sank ten inches under a blow of a hammer falling ten feet was or was not safe to construct such a scaffold upon. It does not appear that any better evidence than the opinions of experts was attainable on this subject, and, therefore, it was proper to permit the question and the answer. This evidence falls, we think, in the second class referred to, and was properly admitted.

The other opinion evidence related to whether the structure without longitudinal X-braces and without scabs or cleats to the uprights was reasonably safe for supporting the weight and strain to which it was subjected; *i. e.*, a thirty-ton crane at a particular place. Here again it is not certain that one not versed in the science and art of construction, after a detailed statement of the facts showing the manner of construction, could form an adequate judgment as to whether a scaffold so built was safe. To do so would require knowledge of the resistance of beams of which, as testified, the scaffold was built, the exact purpose and effectiveness of sway and X-braces and the composition and resultants of forces exerted by a thirty-ton traveler or crane at the end of a structure of certain height and length. The opinions of experts on this subject, though involving the statement of a conclusion, were, therefore, competent.

Cases holding that similar expert opinions are admissible are not wanting. One of these is Littlejohn *v.* Shaw, 159 N. Y. 188, which held, as said in the syllabus, that "the quality and condition of gambier, an article imported for a particular purpose and requiring the existence of certain special conditions in order that the grade of its quality and condition in the market may be determined, were within the rule which permits the introduction of the opinions of experts competent to speak upon the subject when, from the nature of the subject, facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and judgment." And in Meyer *v.* N. Y. C. & H. R. R. R. Co., 98 N. Y. 645, an action for damages to

lands alleged to have been caused by defendant's embankment, an expert was asked: "Are there any adequate causes, in your judgment, for this? [injury]." *Held*, that the question was proper as the inquiry assumed an hypothesis, the truth or falsity of which was left open to the jury, and then asked, not what caused the injury, but what were all the adequate causes which might have been its origin, leaving the jury to determine among them."

Here the experts not only did not assume but refused to state what was the proximate cause or causes of the accident, and gave merely their opinions as to whether the structure, without X-braces and cleats was safe and secure. Whether such braces and cleats were omitted, whether such omission was negligence, and whether that negligence was the proximate cause, were ultimately questions of fact for the jury and were so submitted under the charge of the learned trial judge.

The case of Moore *v.* Westervelt, 27 N. Y. 234, has a suggestive bearing as to opinion evidence. There the question was whether or not a vessel had been properly moored, and a witness, who had experience in mooring vessels, was asked: "What was the condition of the fastenings of the schooner as to safety?" and it was held that his opinion, as one possessing skill in such matters, was competent. More analogous is the case of Baird *v.* Daly, 68 N. Y. 547, where the question in issue was the negligent sinking of a scow, and it was held that the defendant "should have been permitted to show that the scow was unseaworthy; that is, unfitted and unsafe for the service in which she was engaged. The jury were non-experts, and with every fact which would enable a skilled man to determine the question of unseaworthiness it by no means follows that they would make the proper inferences and arrive at a correct conclusion. The witness should have been permitted to answer the question put upon this subject."

Upon this branch of the case, therefore, we think that the rulings of the trial judge in admitting the opinions of the experts are supported by authority.

With respect to the evidence given by Tate, we have the further question presented by the motion made to strike out his testimony upon the ground that he was not qualified to speak as an expert, and for that reason his opinion was improperly admitted. As a matter of fact, his testimony was not very material to the plaintiff, for an analysis of what he said will show that he never flatly stated that the absence of X-braces and cleats in the false work rendered it reasonably unsafe. On the contrary, he distinctly held that the structure, if the stringers were bolted, was safe. It was difficult to

get from him, under any assumption of facts, the statement that the scaffold was unsafe; and, no doubt, from his relations with the defendant Rodgers, who employed him as superintendent and who was originally charged by the plaintiff with responsibility for the accident, there was a natural reluctance on his part to furnish evidence for the plaintiff. We should hesitate, therefore, where, as here, it appears that the evidence given could not have had a material bearing upon the result, to reverse a judgment which was otherwise supported by sufficient competent evidence.

If we assume, however, that his testimony was material, we think Tate was shown to be an expert and qualified by study and experience in his profession to give an opinion upon the subject under investigation. It is true that he stated he had never had experience in building this particular kind of false work; but it also appeared that he was a civil engineer, and had a four years' course of study as such at college and was a member of the Society of American Engineers; that he had been engaged in working at his profession as a civil engineer for sixteen years, and that he was the engineer employed by the defendant Rodgers as superintendent in connection with the driving of the piles on this very structure, and, while so in charge of the work, noticed the manner in which the scaffold was being built and the absence of X-braces. Although he had never been engaged in putting up a like structure, his familiarity with similar work, added to his special knowledge of this particular scaffold gained from observation as it progressed and his sixteen years' experience as a civil engineer based upon a regular course of study, qualified him, in our opinion, as an expert, and his testimony, therefore, was, for what it was worth, properly admitted.

We are thus brought back to the consideration whether, upon the whole case, there was sufficient evidence to submit to the jury the question of defendant's negligence and plaintiff's freedom from contributory negligence.

In many of its features this case is strikingly analogous to that of Davidson *v.* Cornell, *supra*, from which we have already quoted. In that case, as correctly stated in the headnote, "defendants were engaged in constructing an elevated railroad; they used for this work a steam engine and apparatus placed upon a platform on wheels, which moved along as the work progressed, upon girders resting upon crossbeams. While the platform was being moved forward the girders on which it rested gave way and the end of the platform fell to the ground. Plaintiff, an employee of defendants, at work upon the platform where he had been employed for some time previously, was injured. In an action to recover damages

plaintiff's evidence tended to show negligence on the part of defendants in not properly bracing the girders laterally or bolting them to the crossbeams."

In the case at bar the defendants were engaged in the erection of a large structure or scaffold, which measured over fifty feet in height above the bed of the river, fifty feet in breadth for seventy-five feet, and twenty-five feet in breadth for an additional twenty-five feet. It was surmounted by a traveler with a base fifty feet by twenty-eight feet and a height of sixty-two feet, which brought its top 112 feet above the bed of the river. This structure, made up of piles, beams, planks and braces, was much more complicated than that of the elevated railway, and though a trestle or scaffold, in fact was, in many particulars, like a large building, and when completed was expected to sustain a great weight, consisting of the steel and iron girders, which were to be used between the stone piers and form part of the permanent structure of the bridge. This scaffold was a method and means intended to support and for use in the placing and erection of the steel spans of the bridge.

The method employed was somewhat similar. In both instances, after providing for a support for the traveler, the latter was advanced to each new section or bent so as to enable it to hoist the material which was intended to be used in forming the next section or bent. The failure in one to provide upon the elevated structure, on which the traveler was advanced as the work progressed, lateral braces or support, by failing to bolt the girders to the crossbeams, was the cause assigned for the accident; whilst here the main causes assigned were the absence of braces and cleats on the structure of the seventh, eighth and ninth bents or sections before advancing the thirty-ton traveler. Although in the Davidson case there was a reversal upon rulings on evidence, it was expressly held that the submission of the questions of negligence and contributory negligence to the jury was proper. In principle, we do not think, upon facts, that the Davidson case can be distinguished from the one at bar. Both structures were in course of erection and not completed.

It is suggested, however, that there is a distinction between the two cases growing out of the fact that in one the structure was intended for permanent, while in the other it was intended for temporary, use. Such a distinction we do not think sound. Both were intended to be completed structures; both were substantial; both were intended to sustain great weight; and the fact that one was not to be continued in use as long as the other does not seem to us to make a distinction in principle. The essential feature in Davidson *v.* Cornell was the fact that the structure was in course

of erection, and that feature is present here. That case, therefore, is valuable not only in the way of argument, but as an authority; and we do not see why, upon the questions discussed and decided upon a state of facts nearly analogous, it is not controlling.

Upon the whole case, therefore, our conclusion is that the judgment should be affirmed, with costs.

VAN BRUNT, P. J., and HATCH, J., concur.

INGRAHAM, J. (*dissenting*). — Upon the trial the complaint in this action was dismissed against the defendant Rodgers, and the jury found a verdict against the Edgemoor Bridge Works, appellant. The appellant had a contract to do the ironwork of a bridge across the Harlem River known as the Willis Avenue Bridge. The masonry piers had been built, and in order to erect the iron superstructure upon these piers the appellant caused to be built a timber structure which rested upon piles driven in the bottom of the river and extending from pier to pier. While this timber structure, which was to be used as a scaffold for the erection of the permanent iron structure, was in course of erection, it collapsed, and the plaintiff's intestate, who was engaged with other workmen in building this temporary structure, was killed.

It seems to me that the principle applies in cases where the master has failed to furnish for his workmen a safe scaffold for use in their work does not apply, for here no scaffold was furnished, but the accident happened while the workmen were engaged in erecting a scaffold which, when completed, was to be used by the defendant's workmen in the construction of the permanent structure. The negligence charged against the defendant was that proper piles were not supplied to support this structure, and that the structure was not sufficiently braced to sustain the weight of a traveler, which appears to have been a derrick which was run out on the temporary structure as it advanced, to raise the timber used for the erection of the temporary structure. The negligence claimed as to the piles consisted of the fact that they were too short and were not properly driven; but the evidence shows, I think, that the accident was not caused by improper piles, as the piles themselves were broken off instead of being pushed out of position, which would have been the case if they had been improperly driven or not of sufficient length. There was evidence tending to show that the particular portion of the structure upon which this traveler rested at the time of the accident was not sufficiently braced, and that in consequence of this absence of bracing the structure above the piles broke down; and the question as I view it is. whether or not the defendant was liable

because those in charge of the work attempted to proceed too fast by using this traveler before the structure had been properly braced.

An entirely different question would have been presented, it seems to me, if this structure had been completed and the defendant had allowed his employees to use it when at work in constructing the bridge. That is the condition to which the case of Davidson *v.* Cornell, 132 N. Y. 228, applied. The plaintiff who was there injured was employed in building a railroad, and the court, in describing the accident, says: "The structure, called the traveler, containing the engine, boiler and other appliances, was moved on the girders from one crossbeam to another, having the weight of ten to twelve tons, and required a substantial support. In this instance, for some cause, it is said, the girders swayed as the traveler was moving along upon them, and they, with it, fell to the ground. There was no lateral bracing placed between the girders before this weighty structure called the traveler was moved over them. Nor were the ends at the bottom bolted. * * * There was evidence tending to prove that the bracing would have added materially to the stability of the girders, to the support of the traveler and to the safety of the employees engaged upon it, and that such bracing is usual in like cases in other work; also that bolting the girders at the bottom as well as at the top would have essentially aided in keeping them in the position in which they were placed. The conclusion was warranted that the situation in which the girders were when the platform conveying the engine, boiler and other implements was moved over them was such as to be deemed in defective condition for such use and purpose." In that case the question of the defendant's liability does not seem to have been determined, as the case was reversed upon the question of evidence, and a new trial was ordered. The only question that the court discussed, other than that upon which the judgment was reversed, was as to whether the plaintiff assumed the risks incident to the work that he was about to do, but this question was apparently not determined, the court saying: "Those (the risks) not obvious assumed by the employee are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of the structure and appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation."

The late case of Stewart *v.* Ferguson (1), an appeal from this

1. See Stewart *v.* Ferguson, 164 N. Y. 553, preceding case reported. See also Stewart *v.* Ferguson, 52 App. Div. (N. Y.) 317, 8 Am. Neg. Rep. 444 n.

court, and decided by the Court of Appeals, November 20, 1900 [164 N. Y. 553, 9 Am. Neg. Rep. 132] presents a case of a scaffold furnished by the master to his employees to work upon, and it was held there that sections 18 and 19 of the Labor Law enlarge the duty of the master or employer and extend it to responsibility for the safety of the scaffold itself, and thus for the want of care in the details of its construction; but sections 18 and 19 of the Labor Law apply only to a scaffold furnished or erected for the performance of labor in the erection, repairing, altering or painting of a house, building or structure. Here the plaintiff, with other workmen of the defendant, was engaged in erecting the scaffold, and it was because of a collapse of the scaffold in the process of erection that the accident happened; and what was said in Kimmer *v.* Weber, 151 N. Y. 420, 1 Am. Neg. Rep. 156, would seem to me to apply to this case. There the scaffold was being constructed. "The crosspieces, or some of them, seem to have been heavy pieces of timber, and on the day of the accident two of the workmen were engaged in putting one of these timbers in place. While so engaged one of the men let fall the end of the heavy timber that he was holding, and it crushed by its sudden fall and broke one of the crosspieces of the plumbers' scaffold. This caused the whole scaffold to fall, resulting in the injury and death of the plaintiff's intestate. The accident was evidently caused by the neglect of the workmen who were handling the timber or by some defect in the crosspiece of the plumbers' scaffold. If the accident is to be attributed to the act of the workmen who were engaged in putting the timber in place there is nothing in the case to show that the defendants are liable for the misconduct. They were co-servants, and nothing appears to charge the defendants with negligence either in employing them originally or in retaining them. It is not suggested that the judgment can be upheld on such grounds." The court, further discussing the relation of the plaintiff's intestate to the other employees, stated: "The master is not responsible for the negligent performance of some detail of the work intrusted to the servant, whatever may have been the grade of the servant who executes such detail. If it is the work of the servant, and he volunteers to perform it, and if the master is not at fault in furnishing proper materials, there is no breach of duty on the part of the latter." This seems to me to present the exact case now before us. The plaintiff's intestate was engaged in the construction of this scaffold. Other employees of the defendant, who were his fellow-workmen, were engaged with him in the erection of this scaffold. By their negligence this traveler was placed upon a portion of the structure not sufficiently braced, and in consequence

of that negligence the structure gave way, and the plaintiff's intestate was killed. It seems to me that this was the negligence of a fellow-servant, and not the negligence of the master; and for that reason I do not think that the defendant can be held liable.

McLAUGHLIN, J. (*dissenting*). — I dissent. The principal question litigated upon the trial was whether or not the scaffold which collapsed was properly constructed. The defendant was not bound to furnish the best known scaffold, but only such as was reasonably fit and safe, considering the nature of the work to be done upon it — one such as a man of ordinary prudence would construct and use, having regard to his own safety; if he were to do individual work upon it. Harley *v.* Buffalo Car Mfg. Co., 142 N. Y. 31.

As already said, the principal fact litigated was whether the defendant had performed its duty in constructing the scaffold and brought itself within the rule alluded to, and, as bearing upon this question, opinions of several witnesses offered on the part of the plaintiff were taken, against the objection and exception of the defendant. Thus, one witness was permitted to testify: "Q. Now, I ask you, in your opinion as an experienced pile driver, whether the piles were solid enough to construct upon? A. They were not. Q. Mr. Joyce, were the ninth, eighth and seventh bents reasonably safe, in your opinion, without the X-braces which you have described, and without the cleats or scabs which you have described? A. It was not safe." And another witness was asked, "Was it usual to put on a traveler of this kind and stand it over the bents that were not X-braced, one with another, and that did not have X-bracing between the legs of the bents and the sills on which they rested? A. No, sir. Q. Was that a reasonably safe way of constructing such false work? A. No, sir; it was not."

To enable the jury to determine whether the defendant was guilty of negligence in the construction of the scaffold it was proper and competent for the plaintiff to prove in detail the way it was contructed, the strain to which it was subjected, the weight placed upon it, and its liability to break by reason of such strain and weight, as well as the experience of persons who had constructed and used similar scaffolds; in other words, the construction and strain, by reason of the use of the scaffold, could all be laid before the jury, and after a fair and full consideration of such facts it could determine whether or not the defendant had performed its duty. It certainly did not aid it in the discharge of such duty to permit a witness to say that it was not properly constructed or that the scaffold was not safe, because those are questions which must be determined from the facts, and not from the conclusions of a witness, no matter how

learned or skilled he might be in the construction of scaffolds. The exceptions taken to the admission of this testimony were well taken, and, for the errors thus committed, I think the judgment should be reversed and a new trial ordered.

SMITH v. KINGSTON CITY RAILROAD COMPANY.

Supreme Court, New York, Appellate Division, Third Department, November, 1900.

STREET-CAR APPLIANCES — NEGLIGENCE. — In an action to recover damages for injuries to plaintiff caused by her dress catching on the plunger of a street car as plaintiff was alighting therefrom, it was held that defendant was not negligent where it appeared that the plunger was on the car and in the same condition as when received from the builder, and there was nothing to show that any safer appliance existed.

ALIGHTING FROM STREET CAR — TIME — DUTY OF CONDUCTOR. — A passenger is entitled to not only time enough to step off a street car, but also to clear her skirts in the event of any obstruction on the platform, and it is the duty of the conductor to see that the passenger is free from such obstruction before he starts the car, he being negligent if he starts the car before he knows the passenger is free from such obstruction (1).

PASSENGER'S DRESS CATCHING ON PLATFORM OF STREET CAR — CONTRIBUTORY NEGLIGENCE. — A passenger injured by her dress catching on the platform of a street car as she is alighting, is not, as matter of law, guilty of contributory negligence because she traveled with a dress so long that it would be more than likely to catch upon any appliances extending above the platform of a street car.

SMITH and KELLOGG, JJ., *dissented.*

APPEAL from Trial Term.

Action by Sarah C. Smith against the Kingston City Railroad Company. From a judgment on a verdict for plaintiff, and from an order denying a motion to set aside the verdict and for a new trial on the minutes, defendant appeals. *Judgment affirmed.*

Argued before PARKER, P. J., and KELLOGG, EDWARDS, MERWIN, and SMITH, J.J.

A. T. CLEARWATER, for appellant.

1. For actions relating to Passengers Injured while Alighting from Street Cars, etc., from the earliest period to 1897, see vols. 2–7 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic, from 1897 to date, appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

F. ARTHUR WESTBROOK (JOHN J. LINSON, of counsel), for respondent.

PARKER, P. J. — In Lafflin *v.* Railroad Co., 106 N. Y. 136, 139, 12 N. E. Rep. 599, 600, 5 Am. Neg. Cas. 268, 270, referring to the duty of a railroad company, it was said: "It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted." And on page 141, 106 N. Y., page 601, 12 N. E. Rep., page 272, 5 Am. Neg. Cas., it was further said: "As a general rule, when an appliance or machine or structure not obviously dangerous has been daily in use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of culpable imprudence or carelessness." (1) And the principle there enunciated has in several more recent cases been recognized as the correct one. Kelly *v.* Railroad Co., 112 N. Y. 450, 20 N E. Rep. 383; McCaldin *v.* Parke, 142 N. Y. 570, 37 N. E. Rep. 622; Frobisher *v.* Transportation Co., 151 N. Y. 434, 1 Am. Neg. Rep. 148, 45 N. E. Rep. 839.

Applying this principle to the facts of this case, it is difficult to see how culpable negligence can be predicated against the defendant for using the plunger which it did use at the time plaintiff was injured. No evidence in the case disputes the testimony that there were no better or safer cars made than those made by the Pullman Company. It is also not disputed but that the car in question was purchased from that company. If we assume, as plaintiff claims, that the plunger at the time of the accident was the same one and in the same condition as it was when received from such builders, defendant might reasonably rely upon their experience and skill and venture to use it as a necessary appliance, safely and properly located and arranged. If we assume that the defendant, learning that ladies' dresses would occasionally catch thereon, had somewhat changed its location, and placed a hood over the same, still the principle above cited applies. Upon its face, such change seeems to be an improvement upon the plan adopted by the Pullmans. It is a better protection against dresses catching thereon, and there is not a particle of evidence showing that any better method of locating and protecting against such plunger is in use, or was known to any one. What more care could the defendant have taken than it did

1. See Lafflin *v.* Buffalo & S. W. R. R. Co., 106 N. Y. 136, reported in 5 Am. Neg. Cas. 268.

take? Where in the market could it have got a better or safer appliance than the one it used? There is no evidence in the case, of any description, showing or from which it might be inferred that any safer one existed. The one it did use was approved by the experience of the best makers, and any danger to be apprehended from its use was met by the best improvement known to the defendant, and than which, so far as the evidence shows, there was no better. Upon such a state of facts, as matter of law, no culpable negligence could be imputed to the defendant; and it was therefore error to instruct the jury that if they found that this was not a properly constructed car, and that the defendant did not get the best appliances that the market afforded, in respect to the car, they might find that the defendant was negligent. So far as the construction of the car and the plunger was concerned, the case is barren of any evidence to show the defendant liable. But the charge seems inaccurate in another respect. If the question of construction might properly have been left to the jury, there being no evidence that any safer appliance was in use, or could have been procured in the market, the jury were allowed to imagine one, and find the defendant liable for not discovering and using it.

This conclusion would result in a reversal of this judgment, were it not that there is other evidence of defendant's negligence, so plain and controlling that the jury would not have been justified in reaching any different result. Such evidence exists, I think, upon the question whether there was not negligent haste in starting the car, sufficient to render the defendant liable. However, inasmuch as we cannot know that the jury have ever passed upon this question in favor of either party, we can hold the defendant liable upon this ground only upon facts which are not disputed, or as they are claimed to be by the defendant itself. That the plaintiff's dress caught upon the plunger, and that before it was loosened therefrom the car started and dragged her, by the dress so attached, some distance, is not disputed. Now, conceding that the plaintiff had stepped from the car, as the conductor testifies, it is clear that she had not yet entirely detached herself therefrom. Clearly, the car was started before she had had time to unloosen her dress from the plunger; and the question is presented whether it was not the duty of the conductor to give her time, not only to get off, but to release herself entirely from the car, and was it not his duty to notice her condition, and know that she was free from the car before he started it? It is clear from the evidence — too clear for dispute — that the conductor, not anticipating that the dress might catch, started the car upon the instant she alighted, and before he could notice that

it had caught. It has been held that the omission to give a passenger reasonable time to alight from a car is culpable negligence. Poulin *v.* Railroad Co., 61 N. Y. 621 (1); Simpson *v.* Railroad Co., 48 Hun, 113, 116 (2). Is it not clear that this plaintiff did not have that reasonable time to which she was entitled? I am of the opinion that she was entitled to not only time enough to step off, but also to clear her skirts, in the event that they caught upon any obstruction on the platform, and that it is the duty of the conductor to see that she is clear from any such attachment before he starts the car. If he starts before he knows that she is thus free, it is a negligent method of starting, and he takes the chances. Colt *v.* Railroad Co., 33 N. Y. Super. Ct. 189, affirmed in 49 N. Y. 671 (3); McDonald *v.* Railroad Co., 116 N. Y. 546, 22 N. E. Rep. 1068 (4). No great injury was to be apprehended, and probably none would have been sustained, by the mere catching of this plaintiff's dress upon the plunger; but the starting of the car while it was so caught was an act likely to produce serious injury, and was in fact the real cause of her injury in this case. Upon the undisputed facts of this case I cannot but conclude that the conductor's negligence caused this injury, and therefore the verdict must have been against the defendant upon that question.

It is claimed that the plaintiff was herself negligent, in that she traveled upon the car with a dress so long that it would be more than likely to catch upon such appliances as were necessarily extending above the platform. The cases of Poulin *v.* Railroad Co. and Colt *v.* Railroad Co., above cited, are authorities against our holding such an act negligent as matter of law.

The verdict, although large, is not so excessive that we should interfere with it, if we believe that her present condition was caused by this injury; and we cannot refuse to so believe, unless we discredit the evidence of several of the plaintiff's witnesses. Those witnesses do not seem to be in any way impeached, and I am of the opinion that the verdict must be allowed to stand.

I find, therefore, no error in this record for which this judgment should be reversed, and hence it must be affirmed, with costs. All concur, except SMITH and KELLOGG, JJ., who dissent.

1. Poulin *v.* Erie R'y Co., 61 N. Y. 621, is reported in 5 Am. Neg. Cas. 203, 205.

2. Simpson *v.* Rome, Watertown & O. R. R. Co., 48 Hun, 113, is reported in 5 Am. Neg. Cas. 701.

3. Colt *v.* Sixth Ave. R. R. Co., 49 N. Y. 671, is reported in 5 Am. Neg. Cas. 170.

4. McDonald *v.* Long Island R. R. Co., 116 N. Y. 546, is reported in 5 Am. Neg. Cas. 298.

TOLEDO AND OHIO CENTRAL RAILROAD COMPANY v. BOWLER & BURDICK COMPANY.

Supreme Court, Ohio, November, 1900.

LOSS OF PASSENGER'S BAGGAGE — KNOWLEDGE OF CONTENTS — CARRIER LIABLE ONLY FOR GROSS NEGLIGENCE. — 1. Where the only authority given by a railroad company to the baggage agent of a connecting road is to check baggage to all stations on the line of the former road, no presumption follows that such agent has authority to check merchandise over the line of said road under the guise of baggage; and knowledge on the part of such agent that a passenger's trunks contain merchandise, and not baggage, is not sufficient to charge such company with knowledge.

2. On receiving such trunks from the connecting road for carriage, the company, being thus without actual knowledge of their contents, has the right to assume that they contain baggage only, and is not bound to make inquiry as to their real contents.

3. A carrier of passengers is not liable for the loss of a package containing merchandise, shipped over its line by a passenger under the guise of baggage, where neither the carrier nor its proper agent has actual knowledge of the contents of the package, and the loss is occasioned by ordinary negligence, and not that gross negligence which amounts to wilfulness and evinces a reckless disregard of the rights of others.

4. Where, in such case, the cause of a loss of the merchandise was a collision between trains, occasioned by the engineer of a helping engine misreading his watch at 3 o'clock when it was in fact 3·15 o'clock, thus giving but six minutes to reach a meeting point, where twenty-one minutes were required, the mistake being brought about by the engineer holding the stem of his watch — an open-face movement in a hunting case — horizontally instead of perpendicularly, when noting the time, the company will not be liable, the negligence not being gross neglect of duty, within the meaning of the preceding paragraph. Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, as to the second paragraph of the syllabus, is overruled (1).

WILLIAMS and MINSHALL, JJ., *dissenting.*

(Syllabus by the Court.)

ERROR to Circuit Court, Lucas County.

Action by the Bowler & Burdick Company against the Toledo and Ohio Central Railroad Company. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

1. For other actions relating to Liability of Carriers for Loss of Passengers' Baggage and Personal Effects, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See also note on LIABILITY OF CARRIERS FOR LOSS OF PASSENGERS' PERSONAL EFFECTS, 8 Am. Neg. Rep. 51–57.

"The action below was by defendant in error to recover of plaintiff in error for the value of certain merchandise destroyed while in transmission on the road of the railway company by reason of its alleged negligence. At the trial a verdict for the value of the merchandise ($4,986.42) was rendered for plaintiff below, and judgment entered on the verdict, which, upon error being prosecuted to the Circuit Court, was there affirmed. The facts are stated in the opinion."

DOYLE & LEWIS, for plaintiff in error.

GILBERT & HILLS, for defendant in error.

SPEAR, J. — Facts essential to an understanding of the case made by the record follows: The occurrence out of which the controversy arose took place March 16, 1893. At that time the Toledo and Ohio Central Railroad Company owned and operated a line of road from Corning, in the county of Perry, to Bucyrus, in the county of Crawford. At the former place its line connected with the line of the Kanawha and Michigan Railway Company, running thence southeasterly to Athens. The two roads were operated as a continuous line of road between the termini mentioned, and, by the traffic arrangement then existing, through passenger trains were run over the entire line without change of cars. Crews managing through trains were changed at Corning; the one managing the trains south of Corning being in the employ of the Kanawha and Michigan road, and crews managing trains north of Corning being in the employ of the Toledo and Ohio Central road. In collecting mileage from passengers on through trains, the conductors kept separate accounts, and returned to the respective companies the amounts collected for the respective roads. On the day named above, one H. W. Burdick, a traveling salesman for the defendant in error, came from Athens, on the line of the Kanawha and Michigan road, to Glouster, another station on the same road. He was traveling on a mileage ticket issued by the Wheeling and Lake Erie Company, good for passage over other roads, including those before mentioned. The ticket, which was signed by Burdick, provided that "the holder of this ticket shall be allowed free transportation of 150 pounds of baggage, and the company transporting it is hereby released from any and all claims and demands whatsoever for any delay, or for any and all loss or damage while in its possession, in excess of 100 pounds." There came with Burdick, on the train from Athens, two trunks containing watches and jewelry for sale to the retail trade, but not containing baggage. On reaching Glouster he had the trunks taken to the sample room of an adjacent hotel, and there exhibited the contents to customers. Later the trunks

were taken to the station by Burdick's direction, and he caused them to be checked to go on the same train with himself to Bremen, — a station north of Corning, and on the line of the Toledo and Ohio Central road. Testimony was given at the trial by the plaintiff below for the purpose of showing that the baggage master at Glouster (one Jones), who checked the trunks to Bremen, knew that they contained merchandise, and it is probable that the jury found in favor of the plaintiff on that question. This baggage man was the employee of the Kanawha and Michigan Company, and in no sense the agent of the plaintiff in error, except as stated in the stipulation hereinafter to be mentioned. The trunks thus checked were carried by the Kanawha and Michigan road to Corning, and there passed into the possession of the Toledo and Ohio Central road, and from thence proceeded north towards Bremen, the point of destination. At Glouster, Burdick paid Jones thirty cents excess weight on baggage to Bremen, and took a receipt called "Excess-Baggage Receipt." The property was destroyed by fire resulting from a collision, which it is stipulated, and is thus part of the record, occurred under the following circumstances: "The said collision occurred between said passenger train and a helping engine, both being in charge of employees of defendant, and the said collision was caused by the engineer of the helping engine misreading his watch at three o'clock, when, as a matter of fact, it was three-fifteen o'clock, which mistake resulted in giving him only six minutes to reach Claybank, a distance of ten miles, which it was impossible for him to do. The engineer had an open-face watch movement in a hunting case, and he held the stem horizontally, instead of perpendicularly, when reading the watch, and this caused the said error." It was not found possible to save the property or the train, and it was consumed. Respecting the agency of the baggage master at Glouster it is stipulated "that Glouster, the point at which Mr. Burdick took the train which was wrecked, was a station on the Kanawha and Michigan road, and that under the traffic arrangements the baggage agent at that point and his assistant had authority to check baggage to all stations on connecting roads, including those on defendant's road, and that said assistant of the regular baggage agent at said point did check the trunks mentioned in the petition, on the occasion therein mentioned, to Bremen, a station on defendant's road, and placed the said trunks on the north-bound through train." And this is the only evidence bearing upon that question.

At the trial the court, among other things, instructed the jury that: "If the defendant received these goods, — this jewelry, — without any knowledge as to the contents of the trunks, then it

became liable only as an ordinary bailee, and it owed to the plaintiff the duty of ordinary care, as I define it to you. If the defendant received the goods, and undertook to ship them to Bremen, it was its duty to use such care in their transportation and shipment as an ordinary prudent person is accustomed to use in dealing with his own property under the same circumstances and conditions. If it cared for this property in such manner, and it was lost by no act of negligence as thus defined, the plaintiff cannot recover; but, if it failed to use this degree of care, — that is, that care that the ordinarily prudent person takes of his own property in precisely similar circumstances, — then the plaintiff is entitled to recover." And this is one — perhaps the principal — ground of error alleged. In brief, the charge is that the company would be liable for the value of the jewelry and watches, whether it had knowledge that the trunks contained such merchandise or not, provided the loss was occasioned by the negligence of the company. This instruction practically eliminated from the case the contested point, on the evidence, as to the knowledge of the baggage man at Glouster respecting the contents of the trunks. To show that this was an erroneous instruction, we need but cite the decision of this court in this case when here before, as found reported in 57 Ohio St. 38, 47 N. E. Rep. 1039. The syllabus is: "Although a common carrier of passengers is under no obligation to carry articles of merchandise as baggage, and although it is not liable for the loss of such merchandise if it is tendered to and received by it as baggage without actual knowledge of its true character, yet if it receives and checks merchandise as baggage, with actual knowledge on the part of its agents that it is merchandise, it thereby waives its right to immunity from liability because of the character of such article." This is holding, in effect, that a common carrier of passengers, being under no obligation to carry articles of merchandise as baggage, is not liable for the loss of such merchandise if it is tendered to and received by it as baggage without actual knowledge of its true character. Further comment upon this proposition would seem to be unnecessary.

The court further instructed the jury as follows: "The plaintiff claims that the defendant undertook to carry these trunks of jewelry of the plaintiff safely from the station of Glouster to the station of Bremen, and that the baggage agent of the defendant at Glouster had actual personal knowledge that the trunks contained merchandise, and did not contain the baggage of H. W. Burdick, who was the agent of plaintiff. Upon this, the claim of the plaintiff, you are instructed that if you find that the agent at Glouster, Jones, when he received, checked, and shipped these trunks of jewelry

upon the occasion in question, had actual personal knowledge that they contained jewelry, and that the same were destroyed while in the defendant's custody, you should find for the plaintiff. Upon this branch of the case, the question of liability turns upon whether or not Joe Jones, the baggage agent, had actual knowledge of the contents of these trunks. It is not claimed that anybody else had actual knowledge; but if Joe Jones has actual knowledge, and you find that he had the power and authority to receive baggage or receive merchandise and trunks in this manner, and check them for the defendant, notice to Joe Jones would be notice to the defendant. The power and authority to take baggage, or merchandise as baggage, gives the power to receive notice of the contents of the baggage. * * * The liability, therefore, as I have told you, turns upon whether the agent of the defendant at Glouster had actual knowledge when he received and checked the trunks in question that they contained samples of merchandise, and were not ordinary baggage. If he had such knowledge, you must find for the plaintiff; if he had not such knowledge, you must find for the defendant, — that is, upon this branch of the case; and the burden of proof upon all of these questions is upon the plaintiff. And here I will give, as pertaining to the case, certain charges asked by counsel in the case. The following is a correct proposition of law asked for by the plaintiff: If the jury find that the agent at Glouster, when he received, checked, and shipped plaintiff's trunks of jewelry, on the occasion in question, knew that they contained a stock of jewelry, and that the same was destroyed while in defendant's custody, you should find for the plaintiff."

These instructions, in one paragraph, appear to leave to the jury the question of determining not only whether the baggage man, Jones, had knowledge of the contents of the trunks, but whether he had authority from the Toledo and Ohio Central Railroad Company to receive merchandise and trunks and check them, and further instruct that notice to Jones would be notice to the company, and the power and authority to take baggage give the power to receive notice of the contents of the baggage, while in another paragraph the case is made to turn wholly upon whether or not Jones had actual knowledge of the contents of the trunks, irrespective of what they might find as to the authority Jones possessed. This left the matter in a state of uncertainty before the jury; but beyond this the assumption is that Jones, in whatever act the evidence showed he performed with respect to the trunks, and whatever knowledge he had as to their contents, was the agent of the Toledo and Ohio Central Company, and this is based upon another assumption, viz.,

that authority to the employee of a connecting road to check baggage carries authority to check merchandise as baggage, for no other or different authority is shown. This question was presented by the record when this case was formerly before the court, but, for reasons which need not be here stated, was not discussed by the court or disposed of. A majority of the court is now of the opinion that no such presumption follows. Especially does it not follow in this case. Equally misleading is the direction that the power to take baggage gives power to receive notice of the contents of the baggage. There was in this case no baggage concerning the contents of which notice could be given or taken. Nor is it the duty of a company to examine into or pass upon the specific contents of baggage. The company may rely upon the implied representation that whatever is offered by the passenger as baggage is that, and nothing else. If it be baggage, the baggage goes under the contract to carry. If it is not, it does not. Stimson *v.* Railroad Co., 98 Mass. 83. The right to have baggage carried is a right personal to the passenger, and is an incident to his right to have himself carried. Both rights in this case rested upon the written contract. In the carrying out of that contract the baggage man at Glouster might represent the connecting road. But the agreement to carry merchandise would be a wholly different agreement. As to such property the Toledo and Ohio Central Company had no opportunity to make an agreement, and none existed between it and any person whomsoever. Such service, which is freight service, is performed by express companies, or by fast freight companies, or by the railroad company itself; but when by the latter it is by a different department, managed under rules different from those controlling the carrying of passengers, and often, perhaps more frequently, by different persons or agents. And being thus a different service, governed by different rules and managed by different agencies, it is utterly unreasonable to say that authority to act for a connecting company in one branch implies authority to act for it in the other. And hence the agreement or understanding between the man Jones and Burdick respecting the trunks, in so far as it related to merchandise, whatever it may have been, was not the agreement or understanding of the Toledo and Ohio Central Company, and as to that subject-matter there was no agreement or understanding between the passenger, Burdick, and the company. Its contract with him was a strictly personal contract for his safe transportation over the railroad, to which the carriage of suitable personal baggage was, as before stated, merely incidental. He had no right to transport merchandise under cover

of his personal baggage. Much less could he take merchandise which belonged to other persons, and thereby give them the right of a contracting party against the company; for a contract to carry Burdick's person and his personal baggage could not, with reason, be tortured into a contract to carry the plaintiff's merchandise. True, the company did carry the merchandise. But it had the right to assume when it took charge of the car containing the trunks at Corning that they contained baggage, and no duty devolved upon it to make inquiry as to their real contents.

It must be borne in mind that we are here dealing with the liability of a carrier of passengers, not with a carrier of freight, as such. As to the latter, they transport all manner of goods, classify them, and charge according to the class. Thus they are called upon to inquire into the contents and character of what is offered, and may do so with as much thoroughness as they may desire; and with whatever care, or the lack of it, that is done, there is a contract to transport the package, with full opportunity to know its contents. Hence it has often, perhaps generally, been held that the carrier may not stipulate, as against his own negligence, for a liability less than the real value of the article carried. This is on the ground of public policy. As held in Graham *v.* Davis, 4 Ohio St. 368, 377, — a case involving the liability of a common carrier who claimed exemption by reason of a special contract with the shipper: "One of the strongest motives for the faithful performance of these duties is found in the pecuniary responsibility which the carrier incurs for the failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract, therefore, with one to relieve him from any part of this responsibility, reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody." But, as to carriers of passengers, where the baggage is carried as a mere incident, with the right on the part of the carrier to rely upon the implied representation that the package offered as baggage contains that only, it is a fraud upon the carrier for the passenger to palm off onto him, under the guise of baggage, that which is not baggage, but is merchandise, and that only. And it follows, also, that as to such merchandise the minds of the parties have not met, and there is no contract respecting it. The carrier has not agreed to receive and carry that merchandise. The relation that existed cannot with any degree of accuracy be defined as that of a bailee for hire. Such relation can be established only by agreement, and cannot be created without knowledge and consent on the part of the carrier. Here there was no hire paid, no consent, no knowledge. It results that the bailment

was for the exclusive benefit of the passenger. The property was placed in the possession of the company for his convenience, and his only, and that, too, by reason of his unfair and fraudulent concealment, and no just principle can be invoked which will make the carrier liable for loss, save only for his gross neglect of duty, — that reckless disregard of the rights of others which amounts to wilfulness. He may not wilfully destroy or injure the property of another even though it came into his charge by unfair means. He is thus made a bailee, but such without hire, and without consent; and he cannot be held, as in the other case, for the value of the article, either as insurer, or on the ground of mere negligence. And this, we take it, is the difference between the class of cases where a carrier has undertaken to limit liability by giving notice that he will not be responsible, beyond a certain amount, for property he has agreed to carry, and those cases where a deceit as to nature and value has been practiced upon the carrier respecting property which he never agreed to carry. A case illustrative of the application of the principle governing the first class alluded to is Express Co. *v.* Backman, 28 Ohio St. 144, and one illustrating the second class is First Nat. Bank of Greenfield *v.* Marietta and C. R. Co., 20 Ohio St 259. There can be no rule of public policy requiring a carrier of passengers to be responsible for the value of property injured by ordinary negligence while in his possession, where that possession has been had, not by reason of any contract, but by fraudulent concealment and misrepresentation. In the affairs of life negligence is less pernicious than deceit. Cheating cannot have a preferred claim upon justice, even as against negligence. Taking it by and large, a careless person is less dangerous to his fellows than a cheat; and it is not wise to carry the condemnation of negligence to the point of rewarding fraudulent concealment, especially where the result would work a gross injustice. Such concealment, in a case like the one at bar, enhances the risk of the carrier without his knowledge. It exposes him to the hazard of incurring a different liability than that he has agreed to assume, — a liability to which there is practically no limit. If the carrier may be held under such circumstances for from $4,000 to $5,000, as in this case, that liability might, under circumstances differing only as to value, be swelled to hundreds of thousands of dollars. It is but just to hold, as we do, that, where merchandise is shipped under circumstances such as the evidence discloses in this case, it is, as to the connecting road, shipped at the owner's risk. We need not discuss the liability of the Kanawha and Michigan road, had the accident occurred on its line, for we have a different case. The baggage

man was the employee, the agent, the *alter ego*, so to speak, of that company at Glouster. We have found that, respecting the subject-matter of this contention, he was not the agent of the plaintiff in error. Nor can the fact that extra fare was paid Jones for excess baggage to Bremen make any possible difference. That transaction, on its face, related to overweight on baggage, and that only. We do not wish to be understood as finding that there was actual concealment and deceit by Burdick in his dealing with Jones respecting the checking of the trunks. There may or may not have been, but in either event the result worked what would prove a fraud on the plaintiff in error, should it be held liable for the loss of the jewelry.

Our conclusion respecting the question of liability of a carrier of passengers for loss of merchandise, in the absence of knowledge and of contract, is, we believe, fully sustained by the case of First Nat. Bank of Greenfield *v.* Marietta and C. R. Co., *supra*. Authorities bearing with more or less force on the question are the following: Batson *v.* Donovan, 4 Barn. & Ald. 21 (1); Railway Co. *v.* Shepherd, 8 Exch. 30 (2); Railway Co. *v.* Keys, 9 H. L. Cas. 556 (3); Cahill *v.* Railway Co., 100 E. C. L. 154 (4); Macrow *v.* Railway Co., L. R.

1. In Batson *v.* Donovan, 4 B. & A. 21, it appeared that a carrier gave notice that he would not be answerable for parcels of value, unless entered and paid for as such, and a party, with a knowledge of this circumstance, delivered a parcel containing bank notes to a large amount, without informing the carrier of its contents, which was afterwards stolen. *Held*, that the question whether the person had been guilty of unfair concealment by not informing the carrier of the nature and value of the parcel, was properly left for the determination of the jury.

2. In Great Northern R'y Co. *v.* Shepherd, 8 Exch. 30, it was held that a carrier of passengers for hire is, at common law, only bound to carry their personal luggage. Therefore, if a passenger has merchandise among his personal luggage, or so packed that the carrier has no notice that it is merchandise, he is not responsible for its loss. But if the merchandise is carried openly or so packed that its nature is obvious, and the carrier does not object to it, he will be liable.

3. In Belfast and Ballymena R'y Co. *v.* Keys, 9 H. L. Cas. 556, it appeared that a passenger with knowledge that the railway company, though allowing each passenger to carry free of charge a certain amount of luggage, required all merchandise carried to be paid for, took with him, as if it was personal luggage, a case of merchandise, and did not pay for it as such. *Held*, that no contract whatever touching the same arose between him and the company, and therefore on its being lost, he was not entitled to recover the value of it from the company.

4. In Cahill *v.* London & N. W. R'y Co., 100 E. C. L. (10 C. B. N. S.) 154, affirmed on appeal, 13 C. B. N. S. 818, it was held that a railway company is not liable for the loss of merchandise delivered to them by a passenger as his

6 Q. B. 612 (1); 2 Kent, Com. 603; Story, Bailm., sec. 565; Relf *v.* Rapp, 3 Watts & S. 21; Hawkins *v.* Hoffman, 6 Hill, 586; Collins *v.* Railroad Co., 10 Cush. 506; Stimson *v.* Railroad Co., *supra;* Dunlap *v.* Steamboat Co., 98 Mass. 371; Connolly *v.* Warren, 106 Mass. 146; Alling *v.* Railroad Co., 126 Mass. 121; Blumantle *v.* Railroad Co., 127 Mass. 322; Railroad Co. *v.* Thompson, 19 Ill. 578; Railroad Co. *v.* Carrow, 73 Ill. 348; Pfister *v.* Railroad Co., 70 Cal. 169, 11 Pac. Rep. 686; Humphreys *v.* Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711, 37 L. ed. 587.

We are aware that there are decisions to the effect that a common carrier is liable for the value of a passenger's property lost while in his custody by reason of negligence, even though the property is merchandise checked under the guise of baggage, and its true character unknown to the carrier. Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, is a case of this kind. The passenger was Miller & Co.'s agent, who had in his valise samples of merchandise belonging to them. The valise was checked at Bucyrus for Forest, to which point the agent had a ticket; nothing being said about what the valise contained. The passenger and valise landed at Forest about nine o'clock at night. It was not called for, and was placed in the warehouse of the company. During the night the warehouse was broken open and the valise stolen. It was alleged that the warehouse was insecure, and not a safe or suitable place to store property in. The holding, as expressed by the syllabus, is that the implied undertaking of the carrier to insure the safety of baggage does not extend to contents of a trunk consisting of samples of merchandise, but the carrier, by taking the property into his charge, and putting it into the warehouse for safe-keeping, assumes the relation to it of an ordinary bailee, and is bound to take such care

personal luggage, without notice that the luggage contained merchandise.

1. In Macrow *v.* Great Western R'y Co., L. R. 6 Q. B 612, it was held that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, is to be considered as personal luggage.

In the Macrow case, *supra*, it appeared that a passenger by railway from Liverpool to London took with him in a trunk, as his personal luggage, six pairs of sheets, six pairs of blankets, and six quilts. He had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself, with a home in London. The trunk having been lost, he sought to recover the value of the articles from the company. *Held*, that the articles, being intended for the use of his household when permanently settled, could not be considered as personal or ordinary passengers' luggage.

of the property as a man of ordinary prudence would of his own under like circumstances. The assumption on which the ruling is based is that the carrier voluntarily took the property into its charge for safe-keeping, and therefore assumed the relation to it of an ordinary bailee. The fallacy of this is in assuming that the property which is thrust upon a carrier and accepted under a belief, induced by the deceit of the owner, that it is what the carrier has agreed to take, when it is not such, is in his possession voluntarily. As to the merchandise, we think this assumption, for the reasons already stated, is not sound. It is, on principle, in square conflict with First Nat. Bank of Greenfield *v.* Marietta and C. R. Co., *supra*, and with Toledo and O. C. R. Co. *v.* Bowler & Burdick Co., *supra*, and, after mature reflection, a majority of the court has concluded that the case, as to this proposition, should be overruled.

It is argued that the negligence of the engineer of the helping engine which caused the collision and the loss was gross. What distinctions as to negligence exist in law has been a subject of much discussion, resulting in widely differing conclusions. Into this discussion we do not need to enter So far as appears in the record, the company has exercised due care in the selection of an engineer, and he was provided with an accurate timepiece, and undertook to do his duty in its use; but by one of those strange accidents likely to occur to any one, and involving an inadvertence, but no moral fault, he misread the time on the face of the watch. The mistake, while such as would make the company liable for injury to a passenger, was an innocent one, so far as the motive was concerned. In this sense it was not gross, nor did it involve such heedlessness as to indicate a reckless or wilful disregard of the rights of others. In no view, as we think, could such negligence give a right of action against the company to one whose property was on the train not by virtue of any contract, but through the deceit and wrongdoing of the owner. The judgments below will be reversed, and, the facts respecting propositions vital to the case of the plaintiff below being conceded, final judgment will be entered here for plaintiff in error.

Reversed.

WILLIAMS AND MINSHALL, JJ., dissent.

CLEVELAND TERMINAL AND VALLEY RAILROAD COMPANY v. MARSH.

Supreme Court, Ohio, October, 1900.

EVIDENCE — WITNESS — COMPETENCY — QUALIFICATION — VOLUNTEER ASSISTING SERVANT INJURED BY EXPLOSION OF TORPEDO ON RAILROAD TRACK — NEGLIGENCE — PROOF. — 1. It is error to allow a witness to testify, over the objection of the other side, as to the identity of a person, without first qualifying himself by showing that he has some knowledge on the subject.

2. A witness should testify in accordance with the knowledge he has at the time of testifying, and is not confined to the knowledge he may have had at a previous time.

3. One who is invited by a servant of a corporation in charge of its work or service to assist him therein, and does so with some purpose or benefit to be subserved in his own behalf in addition to the purpose of so assisting, is not a volunteer, and is entitled, while so assisting, to be protected against the negligence of the servants of the company (1).

4. While a railroad company owes a duty to the public to keep its tracks free from unnecessary danger along where the public are allowed to use such tracks as a way for travel, one who is not using such tracks as such way cannot be heard to complain of the breach of such duty, and, in case of injury to him, cannot bring the breach of such duty to his aid in attempting to recover for an injury caused by reason of some other alleged negligence of the company.

5. To establish negligence, there should be either direct proof of the facts constituting such negligence, or proof of facts from which negligence may be reasonably presumed. There should be no guessing by either court or jury.

WILLIAMS and MINSHALL, JJ., *dissenting.*

(Syllabus by the Court.)

ERROR to Circuit Court, Summit County.

Action by Raymond G. Marsh against the Cleveland Terminal and Valley Railroad Company. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

"The action in the Court of Common Pleas was for the recovery of damages for a personal injury suffered by Raymond G. Marsh, then of the age of ten years, by reason of the explosion of a signal torpedo on the track of the railroad of the plaintiff in error. The

1. For other actions arising out of Injuries to Volunteers Assisting Employees, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See note, at end of this case, on LIABILITY OF MASTER FOR INJURY TO VOLUNTEER ASSISTING SERVANT.

injury occurred at the village of Myersville, and at that place the railroad runs north and south, and the main street of the village, running east and west, crosses the railroad; the station and water tank being on the south side of the street, and a switch stand about forty rods north of the street, and another about a quarter of a mile south of the street. The railroad company had employed Milo Swinehart as station agent, and it was his duty to light and place upon the switch stands each evening certain lights supplied by the company for the purpose, and to bring the lanterns in each morning, and clean and fill them, so as to have them ready for use the next evening. The station agent, without authority, and without the knowledge of the company, employed the Marsh boy to attend to the lamps; and when on his way to the north switch stand with the light on the evening of April 18, 1896, he found a signal torpedo by the side of one of the rails, at a point about twenty rods north of the street, and, not knowing its dangerous character, he put down his lamp, and exploded the torpedo by pounding it with a stone, and the explosion seriously injured him. The petition averred, and the evidence introduced tended to prove, that people, including children, were generally, for years, accustomed to pass along and upon the railroad where the injury occurred, without hindrance, and with the full knowledge of the railroad company. On the day of the accident, at the hour of 12:33 noon, a local freight train arrived at Myersville station from the north, and ran upon the switch north of the public highway, entering the same at the north end, and there remained until a passenger train, also from the north, which arrived at 12:47 p. m., had passed, and a passenger train from the south, which arrived at 1:01 P. M., had also passed. At 1:03 P. M. it pulled out onto the main track from the south end of the switch, which was about one-fourth of a mile south of the highway, and departed south. Upon the trial there was evidence, admitted over the objection of the defendant below, which tended to prove that one of the crew of the freight train obtained a signal torpedo from the station agent while the train was on the side track that day, and then proceeded towards the north end of his train. As to who placed the torpedo upon the railroad track, or how it came to be there, there was no evidence except the above, — as to one of the train crew having that day obtained such torpedo from the station agent. At the close of plaintiff's evidence, counsel for the railroad company moved the court to rule out all the evidence relating to the travel of people generally upon and along the railroad track north of the highway, which motion was overruled and exceptions taken. There were also proper exceptions saved to the introduction

of certain testimony, and to the refusal of the court to charge as requested, and to the charge as given, which fully appear in the opinion. There was a verdict and a judgment for the plaintiff below, which was affirmed by the Circuit Court; and now the railroad company comes here, seeking to reverse the judgments of the lower courts."

J. P. BRADBURY and ALLEN & COBBS, for plaintiff in error.

TIBBALS & FRANKS, for defendants in error.

BURKET, J. (after stating the facts). — The first question arises as to the introduction of part of the evidence by Dr. Bauer. He testified that on the day of the accident he was in the station when the freight train from the north pulled in upon the side track, and that, "While in there, one of the train crew, I took it to be, came in and held a conversation — " Objection being made, counsel for plaintiff said, "Describe this man that came in." Counsel for defendant, still objecting, said, "He may describe the man." The witness answered, "He was a stranger to me, but he was a trainman, — one of the train crew." The court was asked to exclude and rule out this testimony, but refused to do so, to which there was an exception saved. This testimony was not competent. When a party offers evidence, he must first qualify his witness to speak as to the subject-matter. Here the witness failed to show that he was qualified to say whether the man was one of the crew or not. And, objection being made by counsel for the defendant, it was incumbent upon the plaintiff to show that the witness had some means of knowledge upon the subject, and was not just merely guessing at it. The same witness also testified that this trainman obtained an object from the station agent, and that the trainman and the station agent had some conversation about it, and the station agent said: "Here is one. I have got one," — and handed it to the trainman; that the object was a metallic box about three inches long, two and one-half inches wide, and three-quarters of an inch thick, with rounded ends; that at the time he did not know what it was, but that he knew at the time of testifying that it was a signal torpedo. To all of this testimony there was objection, and proper exceptions saved. As the witness had not qualified as to whether the man who came into the station was a trainman or not, the evidence as to the conversation was incompetent. If the witness did not know on that day what the object so delivered by the station agent was, but, by knowledge subsequently obtained, knew at the time he testified that it was a signal torpedo, it was competent for him to testify to the fact as he knew it to be at the time of testifying. Runyan *v.* Price, 15 Ohio St. 1. A witness may see a stranger and not know who he

is, but by knowledge subsequently obtained, as by acquaintance and association with him, he may be able years afterwards to testify positively who the stranger was. A witness should testify as his knowledge is at the time of testifying, and not as his ignorance was at a previous time.

Upon the trial, counsel for the railroad company requested the court to charge as follows: "If you find that at the time the plaintiff, Raymond Gilbert Marsh, received his injury, he was on the property of the railroad company for no purpose except to place the north switch light in position, pursuant to the request of the station agent, Swinehart, then I say to you that the fact that the railroad company had permitted the public to travel over this part of its property without objection would not entitle the plaintiff to receive at the time of his injury that degree of protection from injury which such public would have been entitled to receive, nor that degree of protection he would have been entitled to receive had he been upon the property as one of the public." This request was refused, and the court charged the jury upon the same subject as follows: "And I say to you further upon this point that it is negligence for the servants of such railroad company, wantonly and needlessly, and without notice, warning, or other precaution, to place and leave exposed to observation, at such point or place on its railroad where the public, including children, are and have been so permitted by the company to travel and pass, an apparently harmless, but in fact highly explosive and dangerous, object, like a signal torpedo, easily picked up and handled by children and likely to attract them, and known to such servants to be such. The question, therefore, gentlemen, comes to this: It is admitted that this boy was injured by the explosion of a signal torpedo on the railroad track. The plaintiff charges that it was placed there and left unexploded, and that at that time and place, and under those circumstances, the track having been commonly used for a long time by the public and by children as a passageway, with the knowledge of the defendant, and with its permission, and that the defendant was guilty of a want of ordinary care in such use of its property, and by placing this torpedo upon its tracks and permitting it to lie there unexploded, whereby the plaintiff was injured. Now, this is the plaintiff's claim. * * * The burden of proof, as I have stated to you, is upon the plaintiff to establish these propositions by a preponderance of the evidence. He must show you that the railroad company permitted its tracks and right of way to be used by the public and by children in the manner that I have already stated to you, and that while he was there upon that track, or passing along the same, under the

circumstances stated in his petition, that he was injured by the explosion of this torpedo, and that the torpedo was placed there and left unexploded by the defendant, its servants or agents." Proper exceptions were saved to this charge, and to the refusal of the court to charge as requested. The court erred in refusing to charge as requested, and in the charge as given, and in refusing to rule out the evidence as to the travel of the public, including children, upon and along the railroad, and also in receiving such evidence. The error occurred by regarding the principles of the case of Harriman *v.* Railway Co., 45 Ohio St. 11, 12 N. E. Rep. 451, as applicable to the facts of this case. In that case an unexploded signal torpedo was knowingly and recklessly left on the railroad track at a point where the public, including children, had for years been permitted to cross the track, using it as a path of travel, and the torpedo was picked up by a boy at that place while using the path of travel in the usual manner, as one of the public passing and repassing along the same; while in the case at bar the torpedo was not picked up by the boy while passing along and upon the railroad track as one of the public, but while going upon the track in the performance of his engagement with the station agent, to light the lamp at the switch stand. His being upon the track at that time was not induced by the fact that the track had been used for years as a line of travel by the public, but by reason of his engagement to light the lamps. His rights and the liabilities of the railroad company would have been the same if the track of the railroad company had never been used as a line of travel, or if the injury had occurred while the boy was going to the switch stand south of the highway, where the railroad was not used as a line of travel, so far as appears in this case. The principle is the same as that held in Kelley *v.* City of Columbus, 41 Ohio St. 263, 270, where the court say: "If there had been a business room in the building, or upon another part of the lot, which would have been an implied invitation to the public to go there, it still would not help the plaintiff, when he admits that he did not go upon the lot for any such purpose."

Counsel for the railroad company also requested the court to give the following charges to the jury, which were refused, and exceptions taken: "2. I say to you further that if you find that he was upon that part of the property of the railroad company where he received his injury, at the time he received his injury, only for the purpose of placing the north switch light in position at Swinehart's request, then his right to be there was no greater than that of a licensee, and the company was under no obligation to do more than refrain from inflicting wilful injury upon him. 3. I say to you

further that, if you find that plaintiff was at the place where the injury was received for no purpose except to carry out the request of Swinehart as to the switch light, then and thereby he assumed all risks of injury, short of wilful injury, that might result from the negligence of any servant of the company. 4. If you find that any member of the train crew of the local freight train which reached Myersville between twelve and one o'clock P. M. on the day of the accident left an unexploded torpedo upon the property of the railroad company, where the plaintiff received his injury, which torpedo was found and exploded by the plaintiff at that place while there pursuant to the request of Swinehart to place said north switch light in position, and in consequence thereof he received the injuries complained of, then I say to you further that such act of said member of that train crew would not constitute negligence of the company, of which the plaintiff could in law complain. 5. The petition in this case does not aver that the defendant had knowledge of the fact that the plaintiff was lighting and carrying the switch lamps back and forth along the railroad, or that the plaintiff was going back and forth along the railroad for any purpose; and, unless you can find from the evidence that the injury to the plaintiff was wilfully and intentionally caused by the defendant, then your verdict should be for the defendant." There was no error in refusing these requests. The requests are all founded upon the theory that one who, upon request, voluntarily assists the servant of a corporation in the performance of his duties without the knowledge of the officers, the servant having no authority to procure such assistance, is a volunteer, and can recover from the company only for wilful injuries inflicted upon him. Upon the hearing this view was persistently urged by counsel for plaintiff in error, both in their brief and upon oral argument. Where a person, at the request of a servant of a corporation, assists such servant in the performance of his work, without any purpose or benefit of his own to be served by such assistance, he is regarded as a mere volunteer; and the requests to charge would be applicable to such a case. But where he has a purpose or benefit of his own to be served by such assistance, in addition to the purpose of assisting the servant, he is regarded as acting in his own behalf, with at least the acquiescence of the company. A trespasser who is upon the company's premises wrongfully, and a mere volunteer, stand upon substantially the same footing, and are entitled to recover only for such negligence as occurs after the servants of the company discover their perilous situation; that is, for wilful or intentional injury. But there is a class between mere volunteers and trespassers, and partaking somewhat of the

characteristics of each; that is, where the person assists the servant at his request, not only for the purpose of assisting in the work of the master, but also for a purpose and benefit of his own. In such cases it cannot be said that he is wrongfully upon the premises, because he is invited by the servant in charge. The master may not have assented, but neither has he dissented; and being there upon the invitation of the servant in charge, and there being no dissent of the master, he is regarded as being there by sufferance. And, being there by sufferance, he is rightfully there for the double purpose of aiding the servant, and thereby furthering the interests of the master, and of furthering his own private interests in his own behalf and for his own purposes and benefits. In such cases the person so assisting cannot be held to thereby become a servant of the master, because the servant inviting such assistance has no power or authority to employ other servants, and therefore the law of fellow-servants is not applicable. As such assistant is not a trespasser, and not a fellow-servant, and not a mere volunteer, the law assigns to him, without name, the position of one who, being upon the premises of another by the sufferance of such other, performing labor or service for his own purpose and benefit in his own behalf, is entitled of right to be protected against the negligence of the owner of the premises or his servants. The case of Railway Co. *v.* Bolton, 43 Ohio St. 224, 1 N. E. Rep. 333, was decided upon this principle, although the principle is not very clearly stated in the report of the case. The case of Eason *v.* Railway Co., 65 Tex. 577, belongs to the same class. The court in that case say: "The principle upon which a recovery is allowed is this: The injured person is not a volunteer, but engaged, at the request or with the permission of the railway's agents, in a transaction of interest as well to himself or his master as to the railroad company, and this entitles him to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. Though performing a service beneficial to both, he is doing so in his own behalf, and not as a servant of the company. The request or acquiescence gives him the right to perform the service. The fact that he acts in his own behalf, however beneficial his labors may be to the company, gives him the right to be protected against the negligence of the company's servants." There is also a clear explanation of this principle in Church *v.* Railway Co., 50 Minn. 218, 221, 52 N. W. Rep. 647, 16 L. R. A. 861. Many other cases illustrating this principle in its application to different facts are found in the above cases, and in cases cited by counsel in their briefs, and

which the reporter will carry into the report of this case (1). As the boy in this case, by his engagement with the station agent, was to perform a service in lighting and cleaning the lamps beneficial to the company, on the one hand, and to himself, on the other, as he was to receive and did receive pay from the agent for his services, we think that he was on the railroad at the time of the injury by the sufferance of the company — not as a servant of the company, nor as a trespasser, nor as a mere volunteer, but as one performing a service in his own behalf, and for his own purpose and benefit — and entitled of right to be protected against the negligence of the servants of the company.

One case is cited by counsel for defendant in error, and we know of no other (Rhodes *v.* Banking Co., 84 Ga. 320, 10 S. E. Rep. 922), where it is in effect held that where a child under the age of discretion assists, upon request, the servant of a railroad company in the performance of his duties, without any purpose or benefit of his own to be subserved thereby, and therefore a mere volunteer, and is injured by the negligence of such servant while in the act of assisting him, the company is liable to such child in damages. Whether this decision was induced by the statutes of that State does not clearly appear, but it probably was, because, in addition to their statutes as to children under the age of discretion, referred to in the opinion, section 3033 of their Code provides as follows: "A railroad company shall be liable for any damages done to persons, stock, or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The injury in that case occurred in moving a freight car. This section is broad enough to make a railroad

1. J. P. BRADBURY and ALLEN & COBBS, for plaintiff in error, cited the following cases: Wood, Mast. & S., sec. 455, and notes; Flower *v.* Railroad Co., 69 Pa. St. 210, 8 Am. Rep. 251; Church *v.* Railway Co., 50 Minn. 218, 52 N. W. Rep. 647, 16 L. R. A. 861; Mayton *v.* Railroad Co., 63 Tex. 77, 51 Am. Rep. 637.

TIBBALS & FRANKS, for defendants in error, cited the following cases: Railway Co. *v.* Bolton, 43 Ohio St. 224, 1 N. E. Rep. 333; Wischam *v.* Richards, 136 Pa. St. 109, 20 Atl. Rep. 532, 10 L. R. A. 97; Osborne *v.* Railroad Co., 68 Me. 49, 28 Am. Rep. 16; Barstow *v.* Railroad Co., 143 Mass. 535, 10 N. E. Rep. 255; Eason *v.* Railway Co., 65 Tex. 577, 57 Am. Rep. 606; Rolling Mill Co. *v.* Corrigan, 46 Ohio St. 283, 20 N. E. Rep. 466; Johnson *v.* Water Co., 71 Wis. 553, 37 N. W. Rep. 823, 5 Am. St. Rep. 243; Rhodes *v.* Banking Co., 84 Ga. 420, 10 S. E. Rep. 922, 20 Am. St. Rep. 362; Evarts *v.* Railway Co. (Minn.), 57 N. W. Rep. 459.

company liable to mere volunteers, whether adults or infants, and yet it is conceded in the opinion that a mere volunteer cannot recover. The exact ground of the decision is not clearly pointed out, and whether the courts of this State would go to the extreme limit of that case may well be doubted. But we are not required, however, in the case at bar, to go to the extent of the Georgia case, because here the boy had a right to be protected against the negligence of the servants of the company upon the principles hereinbefore stated. As the company had employed a proper person for station agent, it had the right to rely upon him, and presume that he would perform his duty as to lighting and cleaning the lamps, and it was not bound to anticipate that the station agent would employ a boy of tender years to perform that duty for him, and therefore it was not bound to keep its right of way in a safer condition than would have been required in case the station agent had attended to the lights himself. If, however, the company had knowledge that the boy was actually performing that service, and for that purpose was daily passing over and along its track, it was bound to anticipate that an unexploded signal torpedo upon its track might be picked up and exploded by him, to his injury; and the leaving of such torpedo upon the track, either wrongfully or negligently, by the servants of the company, would be such negligence as would, in case of injury to the boy by reason thereof, sustain an action against the company.

Counsel for defendant in error have cited and strongly urged the cases of Defiance Water Co. *v.* Olinger, 54 Ohio St. 532, 44 N. E. Rep. 238, 32 L. R. A. 736, and Bradford Glycerine Co. *v.* St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. Rep. 528, but those cases are not applicable to the case at bar. The principle of those cases and Fletcher *v.* Rylands, L. R. 1 Exch. 265 (1), upon which

1. In Fletcher *v.* Rylands, L. R. 1 Exch. 265, affirmed L. R. 3 H. L. 330, generally cited as Rylands *v.* Fletcher, it was held that a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it there at his peril, and if he does not, he will be answerable, *prima facie*, for all the damage which is the natural consequence of its escape, and this however careful he may have been, and whatever precautions he may have taken to prevent the damage.

Fletcher *v.* Rylands, *supra*, was an action for damages resulting from defendant's negligence in constructing and maintaining a reservoir, thereby injuring plaintiff by allowing the water to flow into his mines. The defendant was liable. See Rylands *v.* Fletcher, 3 H. L. 330.

In Pollock on Torts, 428 (2 ed.), it is said: "The authority of Rylands *v.* Fletcher, is unquestioned, but Nichols *v.* Marsland, L. R. 10 Exch. 255, 2 Exch. Div. 1, has practically empowered juries to mitigate the rule, whenever its operation seems too harsh.

they are founded, is, that if the owner of a dangerous animal or substance allows it to escape, or sends it from his own premises upon the premises of another, he is liable for all proximate damages resulting therefrom. In the Defiance Water Co. Case, water was allowed to escape, and in the Bradford Glycerine Co. Case, force of concussion was allowed to escape to the premises of another, and it was held that proper damages might be recovered. The following cases throw some light upon the rights of the parties where some substance is cast upon the premises of another: Iron Co. *v.* Tucker, 48 Ohio St. 41, 26 N. E. Rep. 630, 12 L. R. A. 577; Collins *v.* Gas Co., 131 Pa. St. 143, 18 Atl. 1012, 6 L. R. A. 280; Letts *v.* Kessler, 54 Ohio St. 73, 42 N. E. Rep. 765, 40 L. R. A. 177; Kelley *v.* Oil Co., 57 Ohio St. 317, 49 N. E. Rep. 399, 39 L. R. A. 765. In the case at bar nothing was sent or allowed to escape from the premises of the railroad company, but the injury occurred upon its own premises. The boy came to the dangerous object, instead of its escaping and going to him. The principles governing the two conditions are very different. As signal torpedoes are necessary in the operation of trains on railroads, the possession of them by men of the train crew cannot be regarded as negligence, and it cannot be presumed that they are negligently used; but negligence in such a case, as in all others, must be proved either by testimony directly establishing the fact, or by the proof of facts from which such negligence will reasonably follow and be presumed. The jury cannot be allowed to guess that there was negligence, without some proof thereof, either direct or inferential. For the errors above pointed out, the judgments of the lower courts are reversed, and the cause remanded to the Court of Common Pleas for a new trial.

Judgments reversed.

WILLIAMS, J. (dissenting). — The purport of the instruction requested by the defendant, the refusal to give which is made a ground for reversing the judgments below, is, in its application to the facts of this case, that because the plaintiff, when he received the injury of which he complains, was on the defendant's railway at the instance and procurement of the agent of the company, it was absolved from the duty of observing ordinary care for his protection, and liable only for wilful injury. It is to the maintenance of that proposition that the argument in the briefs for the plaintiff in error is chiefly directed. The statement of the proposition, as there made, is that, as the jury specially found "the evidence did not show that the boy [the plaintiff] was upon the property of the company for any purpose except the performance of his contract

with the station agent, the proper person for the boy to look to for protection or indemnity would be the person [the agent] who sent him into danger," and that "under these circumstances the company owed him no duty of protection, except against wilful injury." The evidence shows that the defendant had intrusted to its station agent the duty of keeping lighted a switch some distance from the station at all proper times, the method of doing which was by placing there at night lighted lamps that were left in the agent's custody for that purpose. These lamps were carried from the station to the switch in time to be lighted before dark, and the next day taken back to the station to be cleaned and made ready for use at the switch at night. The defendant's agent, who had the full charge of this work, employed the plaintiff, a boy ten years of age, to carry the lamps both ways between the station and the switch. He had been performing that service daily for several months before receiving his injury. While so engaged he was frequently noticed on the railway by the defendant's employees in charge of and operating trains over the road at that place; and the jury found, in response to an interrogatory submitted by the defendant, that prior to the plaintiff's injury the conductors, engineers, and brakemen of the defendant's trains had opportunities to know that "the plaintiff was accustomed to pass up and down the track to attend to the switch lights." It was while the plaintiff was upon the defendant's railway in the performance of this work that he found the torpedo and was injured by its explosion.

Independent of the plaintiff's right to go upon the railroad at that place, because it had, by the acquiescence of the defendant, practically become a generally traveled highway, he was in no sense a trespasser or wrongdoer. Though the contract with the defendant's agent was not binding on the company, for want of authority on his part to make it, and no contractual relation existed between the company and the plaintiff, he was nevertheless there in the performance of a service for the company at the express invitation of its agent, in whose control that service had been placed by the company. Even if notice to the defendant's station agent of the presence of the boy on the railway under those circumstances, and of his daily custom of passing along the track while engaged in the work he was so employed to do, should not be held sufficient to charge the company with notice of such use, the defendant otherwise had the means of knowing, by the exercise of ordinary care, that the plaintiff, in the performance of his service, was required and accustomed to go from the station to the switch and back, and thus necessarily pass along the company's track, from which it

might properly be inferred that the defendant acquiesced in that use of its track. And a person of ordinary prudence would reasonably expect that the boy would pick up an attractive article, like an unexploded torpedo, left exposed at that place, and, following his childish instincts, would be likely to handle and explode it. The company should therefore be held to the use of ordinary care to prevent the exposure of the boy to that situation of danger. Harriman *v.* Railroad Co., 45 Ohio St. 11, 12 N. E. Rep. 451; Railway *v.* Shields, 47 Ohio St. 387, 24 N. E. Rep. 658, 8 L. R. A. 464; Powers *v.* Harlow, 53 Mich. 507, 19 N. W. Rep. 257. Besides, it is held in the majority opinion in this case, as I understand it, that as the plaintiff, when he was injured, was on the defendant's road in pursuance of his engagement with the station agent, in the performance of a service for the benefit of the company, of which the agent had control, the duty of due care to protect the plaintiff against injury rested upon the company. In that opinion it is said that "as the boy in this case, by his engagement with the station agent, was to perform a service in lighting and cleaning the lamps beneficial to the company, on the one hand, and to himself on the other, as he was to receive and did receive pay from the agent for his services, we think that he was on the railroad at the time of the injury by the sufferance of the company — not as a servant of the company, nor as a trespasser, nor as a mere volunteer, but as one performing a service in his own behalf and for his own purpose and benefit — and entitled of right to be protected against the negligence of the servants of the company." In either view of the case, therefore, ordinary care was the measure of the defendant's obligation to the plaintiff; and the refusal of the court to charge, as requested, that the company was liable only for wilful injury, was not error.

The doctrine of fellow-servants appears to be inapplicable to the case. The cause of action arose in April, 1896, and the action was commenced in August of that year. The negligence charged as the proximate cause of plaintiff's injury is not that of the station agent, but is that of the defendant's employees in charge and control of its trains — a separate and distinct department of its service; so that under our statute they were neither fellow-servants of the station agent nor of the plaintiff, if he may be called the servant of the company at all.

The reversal of the judgments for error in the charge given by the court is based on the proposition that because the plaintiff, when injured, was on the defendant's roadway under his engagement with the station agent, he lost the right which he otherwise had as one of the public that used the railroad, with permission of

the company, as a traveled highway. If, however, as held in the majority opinion, the plaintiff was rightfully on the railroad track when he was injured, because he was there in pursuance of his engagement with the defendant's agent, and that gave him the right to protection from the negligence of the defendant, it would seem to be unimportant that he should have that right for any other reason; for, if the company was liable for its negligence upon the ground stated, the plaintiff was entitled to recover upon proof of such negligence, and no contributory negligence appeared, although he was not then in the use of the track as one having the right to it as a generally traveled way. In that view of the case the portion of the charge in question was unavailable as a ground of error, because immaterial. But no reason is given, nor is any perceived, why both rights may not co-exist, nor why the exercise of one should destroy the other Indeed, the use of the railroad track by the plaintiff when pursuing his employment with the station agent was a use of it as a way of travel; and his right to use it as a traveled way was not impaired, nor that nature of its use changed, by the fact that the defendant's agent requested him to make that use of it, any more than it would be if he traveled over the track at the request of any other person, or on an errand for his parents, or on his way to school. The only effect of his employment by the defendant's agent was to give him an additional ground for claiming that he was lawfully on the railway when he received his injury. But if it were otherwise, and he was on the railroad only in pursuance of his employment, he was, as has been seen, lawfully there, and on that ground entitled to recover in his action, if without fault on his part his injury was caused, as he claimed, through the negligence of the company in the use of the torpedo; and hence, it became not only proper, but necessary, that the jury should be instructed as to what would constitute negligence in the use of such dangerous instruments by a railroad company where children should be expected to go. The instruction which the court gave on that subject is part of the charge for which the judgments below have been reversed, and is as follows: "It is negligence for the servants of such railroad company, wantonly and needlessly, and without notice, warning, or other precaution, to place and leave exposed to observation at such point or place on its railroad where the public, including children, are and have been so permitted by the company to travel and pass, an apparently harmless, but in fact highly explosive and dangerous, object, like a signal torpedo, easily picked up and handled by children, and likely to attract them, and known to such servants to be such." This portion of the charge is taken

from the syllabus in the Harriman Case, *supra*. Its soundness as a proposition of law is not disputed. Its principle has been accepted and approved in many cases, not only in this State, but in other States generally. Its applicability to this case, in either view that has been taken of it, seems evident. Beyond that instruction and the statement of the plaintiff's claim there is nothing more in the charge complained of, except that the burden was on the plaintiff to show "that the railroad company permitted its tracks and right of way to be used by the public and by children in the manner that I have already stated to you, and that while he was there upon that track, or passing along the same, under the circumstances stated in his petition, that he was injured by the explosion of this torpedo, and that the torpedo was placed there and left unexploded by the defendant, its servants or agents." Certainly it was not improper for the court to charge the jury that the burden was on the plaintiff to show that he was injured by the explosion of the torpedo, and that it was placed on the track where found, and left unexploded, by the defendant, its servants or agents, as alleged in the petition. That burden was indisputably upon the plaintiff. The objection can only relate to that part of the charge which placed on the plaintiff the burden of proving "that the railroad company permitted its tracks and right of way to be used by the public and by children" as a public traveled way; and the ground of the objection stated is that it was not applicable to the case, because the plaintiff, when injured, was not using the track in that way, but was using it in pursuance of his engagement with the station agent. If the plaintiff had the right to claim that he was lawfully upon the railroad when he was injured, because it had become a public traveled highway at that place by the defendant's permission, then, it is conceded, this charge would be correct, pertinent, and material. And if his right to be on the track is restricted to the ground that he was there in the performance of his engagement with the defendant's agent, under the rule declared in the majority opinion, the proof required by this instruction was wholly unnecessary to his recovery. It simply imposed upon him a burden that was not incumbent on him, and in this respect might be harmful to him, but the imposition of such unnecessary burden on him could in no way be harmful to the defendant. On the contrary, it gave the defendant an additional chance of escaping liability at the hands of the jury, if the plaintiff failed to make the proof required by the instruction — a chance to which the defendant was not entitled. Instead, therefore, of this instruction being prejudicial to the defendant, it might have proven beneficial. In any aspect of

the case, the charge given affords no ground for a reversal of the judgment.

The testimony held to be incompetent relates to a transaction and conversation between a person of whom the witness speaks as a "trainman" and the agent in charge of the defendant's railroad station, by which the former obtained from the latter, in the station, a signal torpedo. These instruments are kept by the agents at railroad stations for the use of trainmen for giving signals in the operation of trains. The testimony is held incompetent because the witness did not first qualify himself to speak of the person referred to as a "trainman." The occurrence to which the testimony relates took place at the station near which the plaintiff was injured, and at a time when a freight train had recently arrived. That station is situated in a small village, where few persons went; and the agent appears to have attended to all business at the station — even to the lamps at the switch, some distance away. No other employees were required. These facts were before the court and jury when the witness testified. The identification of a trainman is not the subject of expert testimony. The identity of a conductor or engineer passing from a train just arrived into the station is as obvious to common observation as that of a policeman on his beat in a city. And it would seem as unnecessary to the competency of testimony of the acts of the former, for whose use signal torpedoes are kept, in obtaining such instruments of the agent at the station where they are kept for that purpose, that the witness should first testify he knew the person to be a conductor or engineer, as it was that he should first testify he knew the person in charge of the station to be the station agent, or would be that he knew a policeman when he saw one, before he could testify that he saw a policeman make an arrest. If there was any doubt of the accuracy of the witness' knowledge on the subject, he was open to cross-examination; and the weight of his testimony in that respect, as well as in all others, was for the jury. For these reasons I am unable to concur in the majority opinion or in the judgment.

MINSHALL, J., concurs in the dissenting opinion.

LIABILITY OF MASTER FOR INJURY TO VOLUNTEER.

In connection with the preceding case reported (Cleveland, etc., R. R. Co. *v.* Marsh, Ohio, 1900), see the following cases bearing on the liability for injuries to volunteers assisting servants and others:

When volunteer considered servant.

One who, without being requested or authorized by the master to do so, assists his servants to serve him, is deemed to be so far their fellow-servant as

to limit the liability of the master to him, even though he would not be regarded as a servant so far as to make the master liable to strangers for his negligence. Shearm. & Redf. on Neg. (5 ed.), sec. 182.

Citing Osborne *v.* Knox, etc., R. R. Co., 68 Me. 49; Degg *v.* Midland R. R. Co., 1 H. & N. 773; Potter *v.* Faulkner, 1 B. & S. 800.

This is so where such assistance is given at the request of the servants; and it can make no difference in his favor that the person rendering such assistance does so unasked or even against the will of the master or of the servants, or both. In such case he may be a trespasser; and if so, he diminishes his right to recover for an injury under such circumstances by his contributory fault. Ib.

Citing Helm *v.* Louisville, etc., R. R. Co. (Ky.), 33 S. W. Rep. 396; Osborne *v.* Knox, etc., R. R. Co., 68 Me. 49; Bonner *v.* Bryant, 79 Tex. 540; Johnson *v.* Ashland Water Co., 71 Wis. 553; Hot Springs R. R. Co. *v.* Dial, 58 Ark. 318.

On the other hand, if his assistance is rendered at the request of the master or his authorized agent, he becomes for the time a servant in every legal sense, with the benefits as well as the burdens of that position. Ib.

Citing Central Trust Co. *v.* Texas, etc., R. R. Co., 32 Fed. Rep. 448.

See also the following cases: Penn. Co. *v.* Gallaher, 40 Ohio St. 637; McIntire St. R. Co. *v.* Bolton, 43 Ohio St. 224; Stastney *v.* Second Ave. R. Co., 18 N. Y. Supp. 800.

See also Wood, Mast. and Serv., sec. 455; 1 Lawson, Rights, Rem. and Prac., sec. 325.

Illustrations.

Where it appeared that a young man, seventeen and a half years of age, went upon the premises of a railroad company to view the spectacle of burning tank cars that were filled with petroleum, he assumed the risk of the situation, and the fact that he voluntarily rendered some services in removing some railroad property from the neighborhood of the fire will not make the company liable for injuries sustained by him from an explosion of one of the cars. Cleveland, Cin., Chic. & St. L.R'y Co. *v.* Ballentine (C. C. A. Seventh Cir., Ill. 1898), 4 Am. Neg. Rep. 735, 84 Fed. Rep. 935.

(The cases cited in the opinion of the court by Jenkins, Circuit Judge, are: Goodlander Mill Co. *v.* Standard Oil Co., 24 U. S. App. 7; Kahl *v.* Love, 8 Vr. 5; Savings Bank *v.* Ward, 100 U. S. 195; Crane Elevator Co. *v.* Lippert, 24 U. S. App. 176; Woodruff *v.* Bowen, 136 Ind. 431; Gibson *v.* Leonard, 143 Ill. 182.)

In Cincinnati, New Orleans & Texas R'y Co. (Rec'r) *v.* Finnell's Adm'r (Ky. 1900), 7 Am. Neg. Rep. 439, it was held that a master is not liable to one who is injured while helping his servants at their request, by reason of their negligence. The rule applied where a boy, seventeen years of age, while assisting a brakeman, at his request, to load a piano on a train, was crushed by the fall of the piano, sustaining injuries from which he died.

(Citing Church *v.* R. R. Co. (Minn.), 52 N. W. Rep. 647; Flower *v.* R. R. Co., 69 Pa. St. 210; R. R. Co. *v.* Harrison, 48 Miss. 112; Wischam *v.* Richards (Pa.), 20 Atl. Rep. 532; Mayton *v.* R. R. Co., 51 Am. Rep 637; Evarts *v.* R'y Co. (Minn.), 57 N. W. Rep. 459; R. R. Co. *v.* Gastineau's Adm'r (Ky.), 83 Ky. 119; Kelley *v.* Asphalt Co., 93 Ky. 363; R. R. Co. *v.* Dixon's Adm'r (Ky.), 47 S. W. Rep. 615.)

See also vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

When master liable for injury to volunteer.

In Pennsylvania Co. *v.* Gallaher, 40 Ohio St. 637, where an employee of the railroad company, while repairing a freight car, called upon his son, aged eleven years, to assist him, who, while doing so, was injured by other servants of the company backing a train down upon him, the company was held liable.

In Cumberland Valley R. R. Co. *v.* Myers, 55 Pa. St. 288, 10 Am. Neg. Cas. 178, where the conductor of a freight car not in the employ of the defendant company, was injured while cutting loose, at the request of defendant's conductor, the cars following his own, the defendant was held liable.

See also vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

When railroad company not liable for injury to volunteer assisting shipper.

In Carter *v.* Boston and Albany R. R. Co. (Mass. 1900), 9 Am. Neg. Rep. 51, an action to recover damages for injuries sustained by the fall of a piece of iron, it appeared that plaintiff went with a friend to defendant's freight house as a volunteer to assist his friend to ship some freight. The freight-house door was locked, but no freight was being received on the day of the accident, though plaintiff did not know this. He took hold of the chain with which the door was locked and shook and rattled it to see if he could get in, when a piece of iron weighing about 700 pounds, which stood on the platform leaning against the freight house, fell on him and injured him. The accident happened on February 22, and the piece of iron had stood there since November 11, preceding. A verdict was directed for defendant. *Held*, that the direction of verdict for defendant was right, as the mere fact that the piece of iron was placed by defendant on the platform leaning against the freight house was not of itself evidence of negligence, and the burden of proof was on plaintiff to show that the accident was due to defendant's negligence.

Person assisting passenger.

As to the liability of carrier for injuries to persons assisting passengers, see the following:

Where a lady, accompanied by a little girl, and incumbered with hand baggage and parcels, which she cannot, unaided, place promptly and safely upon the train, and has, consequently, to procure the aid of another in carrying her baggage aboard, such other person has a right on the train for such purpose, especially when the agent of the company in charge of the train sees the situation of such passenger, offers no assistance himself, and does not object to such assistance of the lady going upon the train. In such a case the fact that the sudden jolting or jerking of the train on starting throws the man accompanying the lady, with a valise, against her, and causes him to thus knock her upon the seat, whereby she is injured, without fault on the part of either, does not relieve the railroad company from liability. Judgment for plaintiff for $4,000 affirmed. Macon, Dublin & Savannah R. R. Co. *v.* Moore (Ga. 1899), 6 Am. Neg. Rep. 451. See former decision in same case, 99 Ga. 229.

See also Suber *v.* Railway Co., 96 Ga. 42.

In Lake Shore & Michigan So. R'y Co. *v.* Salzman, 52 Ohio St. 550, 10 Am. Neg. Cas. 16, affirming 9 Ohio C. C. 230, where a passenger was taken sick on a railroad train and plaintiff, with other passengers, was requested to assist the sick man to the caboose at the end of the train, and while passing between the

passenger and caboose cars, plaintiff fell between the platforms and was injured, the railroad company was held liable.

A person who enters a railroad car for the purpose of assisting a woman to a seat, and is injured in getting off by reason of the train not being held long enough for him to get off, cannot recover damages unless notice was given to the trainmen. Judgment for plaintiff reversed on ground of erroneous instruction on this point. Little Rock & Ft. Smith R'y Co. *v.* Lawton, 55 Ark. 428, 2 Am. Neg. Cas. 148.

For other actions relating to Liability of Carriers for Injuries to Persons Assisting Passengers on Trains, etc., from the earliest period to 1897, see vols. 2–10 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic, from 1897 to date, appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

CITY OF CINCINNATI v. FLEISCHER.

Supreme Court, Ohio, October, 1900.

PEDESTRIAN STUMBLING OVER CARRIAGE BLOCK NEAR CURB ON SIDEWALK — CITY NOT LIABLE. — The statute requires of municipalities the exercise of ordinary care in the construction and maintenance of streets and sidewalks; but that duty is not violated by permitting a carriage block of the usual size to occupy the usual position of such blocks, near the curb, and not upon that portion of the sidewalk which is designed for the use of pedestrians going upon, or passing along, the walk (1).

SPEAR, J., *dissenting.*

(Syllabus by the Court.)

ERROR to Superior Court of Cincinnati.

Action by George H. Bennett against the City of Cincinnati. From judgment for plaintiff, defendant brings error. One Fleischer, on the death of plaintiff, was substituted. *Judgment reversed.*

"In his lifetime George H. Bennett, the intestate of Fleischer, recovered a judgment against the City of Cincinnati on account of a personal injury which resulted to him from stumbling over a stepping stone or carriage block, located on a sidewalk of Race street, near the curb. The allegations of negligence in his petition are as follows: 'Plaintiff says that the defendant is a city of the first grade of the first class, and is a municipal corporation, duly organized and existing under the laws of the state of Ohio. That heretofore, to wit, on the 19th day of January, 1898, the defendant

1. For other actions relating to Obstructions on Sidewalks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

wrongfully, willfully, knowingly, and negligently caused, suffered, and permitted a large stone block, about fourteen inches wide, and about nine inches high, and two and one-half feet long, to be and to remain upon the sidewalk of Race street, on the west side of said street, between Fifth and Sixth streets, in the said city of Cincinnati, and opposite No. 529 Race street, about two feet from the curb of said sidewalk. That the said Race street was then and there for a long time prior thereto, and still is, a public street, which is much traveled and used by the citizens of the said city of Cincinnati, and by the public generally. That there was no guard, railing, lights, or signs around the said block of stone, and that the said block of stone had been permitted by the defendant to remain upon the said sidewalk, as stated, for a long space of time prior to the said 19th day of January, 1898, of all of which the defendant then and there had due and reasonable notice. That on said 19th day of January, 1898, about 6:20 p. m. of said date, when it was then and there dark, the plaintiff was then and there lawfully traveling on said street, walking south on the west side of the said Race street, and the plaintiff, without any default or negligence on his part, and not knowing that the said block of stone was then and there obstructing the said sidewalk, the plaintiff being then and there unable to see said block of stone by reason of the darkness and rain, and of the number of the people carrying umbrellas raised, who were then and there using said sidewalk, then and there struck his left foot against the said stone on the said sidewalk, and then and there fell, and was then and there severely bruised,' etc. The city admitted its corporate character, and that Race street was at the time of the plaintiff's alleged injury, and for a long time prior thereto had been, a public street, and it denied all other allegations of the petition. On the trial of the issues the city offered no evidence. The plaintiff introduced evidence tending to show that the carriage block was of stone, somewhat smaller than the usual size, and lying only far enough from the curb to permit the hubs and steps of carriages to pass. It was used for the convenience of persons getting into or alighting from carriages. It had occupied substantially the same position for more than fifteen years. At the conclusion of the plaintiff's evidence counsel for the city requested the court to direct a verdict in its favor, which was refused. Other instructions were requested and refused, but they are not material to the view which we take of the case. A verdict for the plaintiff having been returned, a motion for a new trial was overruled, and judgment was entered on the verdict. This judgment was affirmed by the Superior Court at General Term."

ELLIS G. KINKEAD, WADE H. ELLIS, JOHN V. CAMPBELL, and H. K. RODGERS, Corp. Counsel, for plaintiff in error.

EDMUND T. CLAYTON, THOMAS L. MICHIE, and JOEL C. CLORE, for defendant in error.

SHAUCK, Ch. J. (after stating the facts). — The duty of municipalities with respect to streets and sidewalks is imposed by section 2640 of the Revised Statutes. It is to "cause them to be kept open and in repair, and free from nuisance." They are required to maintain such portions of them as are designed for the use of vehicles and pedestrians in a condition of reasonable safety for such use. They are not required to exercise such extraordinary care as will absolutely prevent the occurrence of accidents, nor to prohibit such usual erections in proper portions of the streets as public convenience requires. The block over which the plaintiff below fell although upon the sidewalk, was not at a crossing nor upon any portion of the street designed for the use of passing pedestrians. It was within that portion of the street by the curb which according to common knowledge, is devoted to carriage blocks, lamps, hitching posts, and shade trees, which pedestrians of ordinary care observe and avoid. There is no reason to question the correctness of the observation of Spear, J., in Elster *v.* City of Springfield, 49 Ohio St. 82, 96, 30 N. E. Rep. 274: "The laying of sewers like that of gas and water pipes beneath the soil, and the erection of lamps and hitching posts, etc., upon the surface is a street use, sanctioned as such by their obvious purpose and long-continued usage." Any rule which would sustain a recovery in this case would require municipalities to remove all shade trees, and all such erections, whatever public inconvenience might result therefrom. In the well-considered case of Dubois *v.* City of Kingston, 102 N. Y. 219, 6 N. E. Rep. 273, where the facts shown, and the municipal duties involved, were, in substance, the same as those which are here presented, a recovery was denied. The allegations of the petition in this case permitted the presumption that the block was of the usual size, and that it occupied the position usually assigned to such blocks. The evidence offered by the plaintiff showed affirmatively that it was of such usual size, and that it occupied such usual position. Therefore the petition failed to state a cause of action, and the instruction requested should have been given.

Judgment reversed.

SPEAR, J. (dissenting). — The syllabus assumes that the block stood in the usual place on the sidewalk, and in a place where pedestrians were not accustomed to walk. Neither assumption is justified by the record. The stone stood thirteen inches from the

curb, instead of at the curb, and was on Race street, in Cincinnati, between Sixth street and Shillito place, a thickly-settled and much-frequented business street, where there were likely to be, at certain times of day, crowds of people. In my opinion the law applicable to the facts was correctly given by the presiding judge, and the jury's verdict was fully warranted by the facts.

JOHNSON v. CITY OF CINCINNATI.

Ohio Circuit Court, First Circuit, Hamilton County, November Term, 1900.

PROPERTY DAMAGED BY WATER — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE — ERRONEOUS INSTRUCTION. — In an action to recover for damages to property caused by obstruction of water negligently permitted by the city to remain on plaintiff's premises, it was held reversible error to charge the jury that "in making repairs, after the rendition of judgment in the former case, it was the duty of the plaintiff to exercise reasonable care and forethought to avoid a recurrence of the injury. If you find that the subsequent injury to the plaintiff's property was the result of negligence, partly of the city and partly of the plaintiff, your verdict must be for the defendant, however slightly such negligence of the plaintiff may have contributed to said injury;" as unless the negligence of the person injured contributed directly to the injury, it does not preclude recovery (1).

THE facts of the case appear in the opinion. *Judgment reversed.*

Before SMITH, SWING, and GIFFEN, JJ.

JOHNSON & LEVY, and JOHN S. CONNER, for plaintiff in error.

ELLIS G. KINKEAD, Corporation Counsel, for defendant in error.

GIFFEN, J. — The plaintiff claimed damages for the negligence of the city in permitting a culvert in Browne street to become and remain obstructed whereby the water, which otherwise would have flown through it, diverted onto and over plaintiff's premises, causing the foundations of her houses to slip and settle, greatly to her damage.

The answer of defendant sets up a former recovery in the sum of $525 on the 16th day of March, 1891, for the same cause of action, and charges contributory negligence in building and restoring her premises, with full knowledge that the ground was slipping and

1. For actions relating to Damage to Property Caused by Overflow, Sewage, etc., from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

sliding since the former suit, thereby increasing the damage which would accrue to her by reason of said landslide. The jury returned a verdict in favor of the defendant, and judgment having been rendered thereon, the plaintiff prosecutes error.

It is contended that the court erred in orally modifying the second special charge in writing requested by the plaintiff. It does not clearly appear that this instruction was presented to the court in writing, as contemplated by section 5190, Revised Statutes, but assuming that it was, it further appears that the comment by the court in the midst of the charge only emphasized the charge itself as requested by the plaintiff, and hence could not have been prejudicial.

The purport of the charge was that if the city, by the exercise of reasonable care, could have remedied the defects in the street, its failure to do so made it liable; and the court added the following: "So you see it all comes back to the question of reasonable care." The plaintiff could not ask any higher degree of care from the defendant, and if the oral explanation by the court was not prejudicial it cannot avail as a ground of reversal. Scovern *v.* State, 6 Ohio St. 288; McHugh *v.* State, 42 Ohio St. 154.

It is further contended that the court erred in giving, at the request of the defendant, the following special charge, to wit: "In making repairs, after the rendition of the judgment in the former case, it was the duty of the plaintiff to exercise reasonable care and forethought to avoid a recurrence of the injury. If you find that the subsequent injury to the plaintiff's property was the result of negligence, partly of the city and partly of the plaintiff, your verdict must be for the defendant, however slightly such negligence of the plaintiff may have contributed to said injury."

In the recent case of Schweinfurth, Adm'r *v.* Railway Co., 60 Ohio St. 215, it is held that: "In an action for negligence it is not error to refuse an instruction that the defendant cannot be held liable, though guilty of the negligence charged, if the negligence of the person injured contributed in any degree, or in any way, to the injury of which he complains. Unless the negligence of the person injured contributed directly to, or as a proximate cause of the injury, it does not preclude a recovery."

Counsel for defendant seek to distinguish that case from the one before us in the fact that the court refused to give the charge in the former and did give it in the latter. It is manifest, however, that the refusal to give the charge is justified, not on the ground that the same is harmless, but because it incorrectly states the law of contributory negligence. The court approvingly cite a note from

Thompson on Negligence, to wit: "The House of Lords has lately held it error to charge a jury in this or similar language without qualification" (1).

The facts in this case will illustrate the rule that unless the negligence contributed directly to the injury, it does not preclude a recovery, because the negligence of the plaintiff in not providing stronger walls and digging trenches around the same may have increased the damage occasioned by the overflow from the street, and yet be not a concurring cause, without which no damage would follow. While it is true that plaintiff was bound to exercise ordinary care in repairing and strengthening the walls after the former suit, she was not required to anticipate and provide against the negligence of the city.

If the failure of the plaintiff to provide against the ordinary and natural conditions surrounding her premises was the sole cause of the damage, then there was no negligence of the city, nor could there be any question of contributory negligence. This is substantially the third defense of the answer, and if sustained by the evidence, the plaintiff would fail, not because of her contributory negligence, but rather because of a want of negligence of the city.

We therefore hold that the court erred in giving this special charge, which was repeated substantially in the general charge.

Judgment reversed and cause remanded.

VELAS v. PATTON COAL COMPANY.

Supreme Court, Pennsylvania, October, 1900.

PRACTICE — RESERVED POINT. — Where no exception is taken to the form of a reservation at the trial, the parties are bound by it, and cannot be heard in the appellate court against it.

EMPLOYEE INJURED BY MINING MACHINERY — FELLOW-SERVANT — EMPLOYER NOT LIABLE. — In an action for personal injuries received by plaintiff while in defendant's employ in operating a mining machine without properly securing it, it was held that where the negligence complained of was an order given by the mine foreman, who was plaintiff's

1. This quotation appears in 2 Thompson on Negligence, p. 1151, note 2, in the chapter on Contributory Negligence, under sec. 5 of the notes on the general doctrines of the subject. The English case referred to is Radley *v.* London & N. W. R'y Co., L. R. 9 Exch. 71, 43 L. J. Exch. 73 [1874], 1 App. Cas. 754 [1876], reversing L. R. 10 Exch. 100, 44 L. J. Exch. 73, 33 L. T. N. S. 209 [Exch. Ch. 1875].

fellow-servant, and there was no evidence that the superintendent participated in any manner in the direction or control of the work in which plaintiff was engaged, the defendant was not chargeable for the injury plaintiff received (1).

APPEAL from Court of Common Pleas, Cambria County.

Action by Martin Velas against the Patton Coal Company for personal injuries received while in defendant's employ in operating a mining machine without properly securing it. Judgment for defendant on a reserved point, and plaintiff appeals. *Judgment affirmed.*

The following is the opinion of the lower court:

"At the time of the trial of the above-stated case it was reasonably clear to our mind that the plaintiff did not prove that the injury complained of resulted from the negligence of the defendant company, but that, if it resulted from the negligence of any one clear of contributory negligence on his part, it was the negligence of a fellow-employee, for which the company was not chargeable. The plaintiff was employed as a 'runner' of a mining machine, the knives or cutters of which were operated by electricity. In the operation of the machine another man was employed, called a 'scraper.' It was the duty of these men to place the machine in position to make a cut under the breast of coal to be taken out. In order to place the machine in a proper position, it was necessary to secure it firmly, and this was done by means of two jacks, one reaching from the front of the machine and the other from the rear of the machine to the roof. It was the business of the scraper to secure the front jack, and of the runner to secure the rear jack. When the machine had been thus placed, it was the duty of the runner to apply the current that operated the knives, and the duty of the scraper to remove the loose coal cut by the knives. At the time of the accident the jacks had been placed in position, but, after cutting a short distance they came loose, because, according to the testimony of the plaintiff, a sufficient hole had not been made in the roof to secure the rear jack firmly. He and the scraper testified that he was about to obtain a heavy pick to make the hole larger, when he was directed by the mine foreman to hold the machine in place with a bar. He states that he told the mine foreman 'he had never seen it done that way,' and that the latter replied 'Now, Martin, you do what I tell you; everything is right.' That he went to the left of the machine, near the front, and held

1. For other actions relating to Injuries to Employees, in which the question of Fellow-Servant is involved, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

the bar, and the mine foreman told his brother, who was present, and who was employed in some capacity about the mines, to turn on the power, and that when the power was turned on the machine jumped, and the knives or bits cut his leg off. He had been working as a scraper on these machines for about six weeks, and as a runner for six days, before the accident. He testified that he had been taught how to run the machine, and that he knew how to run it; that his instructions had been to fasten the machines with jacks, and that he had never seen them held with a crowbar; that his duty was to stay back where the power was turned on, to turn it on, and attend to the rear jack. The mine foreman and others present, we believe, denied that he was instructed to hold the machine in place with a bar, but we submitted that question to the jury, and they found in favor of the plaintiff. At the time the plaintiff was injured he was not at the point on the machine where his duty required him to be, and had he been at that point he could not have been injured. He attempted, according to his testimony and that of the scraper, to keep in place a machine operated by a powerful current of electricity, that ordinarily required two jacks screwed tight to keep it in place, with a single crowbar, and that it was dangerous to attempt to do this the result demonstrated, and, unless he shows that the defendant company was responsible for his being in that position, it is clear that he cannot recover. He has undertaken to show that he was in that position by direction of the mine foreman. That fact was established by the verdict of the jury, and the only question in the case is as to whether or not the defendant company can thereby be charged with negligence, and made to respond in damages.

"It has been held in a number of cases by the Supreme Court of this State that a mine foreman is a fellow-employee, and that the owners or operators of the mines are not responsible for his negligence, carelessness, or misconduct resulting in an injury to another employee, and, there being neither allegation nor proof that the mine foreman in this case was incompetent, we are now entirely satisfied that a proper application of the rule of law, which has frequently been said by the Supreme Court to be as old as the common law, which does not allow an employer to be held responsible for an injury done to an employee by reason of the negligence or misconduct of a fellow-employee, requires us to hold that there can be no recovery against the defendant in this case. The duties of a mine foreman are prescribed by the different acts of assembly requiring the mine owner to employ him, and the fact that the owner is required to employ him is given as a reason for holding that the

former is not liable for his negligence in Coke Co. *v.* Roby, 115 Pa. St. 368, 8 Atl. Rep. 593; but it is clear from the reasoning employed in that case, as well as in Reese *v.* Biddle, 112 Pa. St. 72, 3 Atl. Rep. 813, Waddell *v.* Simoson, 112 Pa. St. 567, 4 Atl. Rep. 725, Coal Co. *v.* Jones, 86 Pa. St. 432, and Canal Co. *v.* Carroll, 89 Pa. St. 374, where the precise question was before the Supreme Court, that a mine foreman and a miner are fellow-servants, without regard to the provisions of the act of Assembly; and, for a further elaboration of the principles that justify that conclusion, we refer to Bridge Co. *v.* Newberry, 96 Pa. St. 246, and Prevost *v.* Refrigerating Co., 185 Pa. St. 617, 40 Atl. Rep. 88, and the cases there cited. The supervision, control, or management of mining machines is not among the duties of a mine foreman, as specified by the acts of assembly. There is no evidence in this case that Alex. Monteith exercised any such supervision, control, or management in the mines in which plaintiff was injured, or was authorized to do so by the owners, or was held out by them to the other employees as having authority to do so. Jack Monteith and Mr. Brandt had exclusive charge of placing the machines and directing the manner in which they should be operated, so far as the evidence in this case shows. If the plaintiff, then, was injured in attempting to execute an order given by Alex. Monteith as to the manner in which he should secure the machine, the defendant company is no more responsible than it would have been had the order been given by his 'scraper,' or by one of the bystanders, who were in the mine at the time witnessing the operation of the machine, and it is immaterial whether he was injured because too much power was applied, for the reason that had he been in his proper place on the machine he could not have been injured at all.

"The plaintiff sought to prove that the president of the defendant company was present at the time of the injury, but it was so clear, after all the evidence was in, that it was a case of mistaken identity, that this matter was not pressed by the plaintiff's counsel; and it was also testified by the plaintiff, and we believe by his other witness, that the general superintendent of the defendant company's mines was present and heard the order given to plaintiff to hold the machine in place with a bar. He was in the room when plaintiff was hurt, but that he was in a position to hear any order given by Alex. Monteith was denied by the superintendent and the defendant's other witnesses; but assuming that he was present, or even that the president of the company was present at the time, and no case has been cited, nor have we been able to discover any, that goes so far as to say that their presence alone would

make their company responsible for the results of an order given by a fellow-workman or a bystander under such circumstances as existed in this case.

"The conclusion we have arrived at makes it unnecessary to discuss the question as to whether or not the plaintiff was guilty of contributory negligence in undertaking to do something he was not bound to do, even though ordered by a superior or by a person sought to be held responsible or in the presence of the latter. We submitted the question to the jury as to whether or not the danger was so imminent that he was negligent in undertaking to follow the directions which he testified were given him by the mine foreman; but, under all the circumstances of the case, considering his knowledge of the proper manner of securing the machine in place, and the fact that the proper place for him was a safe one, and that he put himself in a position proven to have been unsafe, it seems to us that we would have been warranted in saying, as a matter of law, that the defendant was not responsible, in about the same language used by Judge Albright in the case of Diehl *v.* Iron Co., 140 Pa. St. 487, 21 Atl. Rep. 430, which was expressly approved by the Supreme Court, and under the law as stated by Mr. Justice Green in Reese *v.* Clark, 146 Pa. St. 465, 23 Atl. Rep. 246. And now, 4th day of September, A. D 1899, for the reasons given above, it is directed that judgment be entered on the reserved points in favor of the defendant, *non obstante veredicto.*"

DONALD E. DUFTON and FRANCIS P. MARTIN, for appellant.

EVANS & LEECH and SWOOPE & PATTON, for appellee.

PER CURIAM. — It is well settled that, if no exception is taken to the form of a reservation at the trial, the parties are bound by it, and cannot be heard in the Appellate Court against it. Mohan *v.* Butler, 112 Pa. St. 591, 4 Atl. Rep. 47; Boyle *v.* Borough of Mahanoy City, 187 Pa. St. 1, 4 Am. Neg. Rep. 724, 40 Atl. Rep. 1093; Rynd *v.* Baker, 193 Pa. St. 486, 44 Atl. Rep. 551. In the case at bar no exception to the form of the reservation was taken at the trial, and therefore the parties are bound by it, as above stated.

It is alleged by the plaintiff that the order of which he complains was given to him by the mine foreman, who was his fellow-servant. There is no evidence in the case that the superintendent participated in any manner in the direction or control of the work in which the plaintiff was engaged. Indeed, it is, at least, doubtful whether the superintendent was present or in hearing when the order was given or the injury to the plaintiff was received. If, therefore, there was any negligence which caused the accident, it was the negligence of the mine foreman, or of the plaintiff, or of both. There

is no evidence in the case on which negligence can be charged against the Patton Coal Company or its superintendent. It follows that the defendant company is not chargeable for the injury the plaintiff received. We therefore affirm the judgment on the opinion and decree of the learned court below.

Judgment affirmed.

FRICKER v. PENN BRIDGE COMPANY.

Supreme Court, Pennsylvania, October, 1900.

EMPLOYEE STRUCK BY HOT RIVET WHILE FITTING UP IRON PLATES — RISK OF EMPLOYMENT. — In an action to recover damages for injuries received by plaintiff while in defendant's employ, by being struck by a hot rivet thrown from a furnace to the riveters engaged in fitting up iron plates, it was held that a servant or employee of a company assumes all the risks of his employment, however they may arise, against which he may protect himself by the use of ordinary observation and care (1).

APPEAL from Court of Common Pleas, Beaver County.

Action by John C. Fricker against the Penn Bridge Company for injuries received by plaintiff while in defendant's employ, by being struck by one of the hot rivets which were being thrown from the furnace to the riveters, plaintiff being engaged in fitting up the iron plates preparatory to their being riveted together. From judgment for defendant, plaintiff appeals. *Judgment affirmed.*

"Plaintiff's first and second assignments of error are to the rejection of evidence offered to show that in other mills it was customary

1. See note on ASSUMPTION OF RISK, 7 AM. NEG. REP. 97–111.

See also the following cases against the same defendants as in the case at bar:

CARNAGIE *v.* PENN BRIDGE CO. *(Pennsylvania, October, 1900)*, 47 Atl. Rep. 355, was an action by Henry A. Carnagie against the Penn Bridge Company for injuries received while in defendant's employ as a common laborer on a bridge being constructed across a river. Braces or bents used to support the bridge while in process of construction were being removed on its completion. This was done by removing the bolts with which the bents were fastened together, and attaching a pulley rope to the top of each bent, which, when operated by an engine, lowered the bents one by one. One of the bents struck, and Wilson, the boss of the gang, ordered plaintiff to push it off. This he was unable to do, and he was then told to sit down and put his feet against it. He did this, and shoved it off, whereupon it "kicked up at the bottom," and struck the bent on which plaintiff was sitting, and knocked it down, injuring him. From judgment for defendant, plaintiff appeals. Judgment affirmed, it being held that if

to have a boy, whose duty it was to receive the bolts when thrown, and see that the way was kept clear of men between the points from which and to which the bolts were thrown, and opinion evidence that sufficient protection was not furnished by the regulations of defendant that the riveting gang should call to the boy to throw the rivets, and before he threw them he should call out. The court, in refusing the first offer, stated the question was not whether defendant had the work in its establishment performed as in other establishments, but whether or not it used ordinary care in the management of its business. The third assignment of error is to the affirmance of defendant's second point: 'A servant or employee of a company assumes all the risks of his employment, however they may arise, against which he may protect himself by the use of ordinary observation and care.' "

WILLIAM A. MCCONNEL and WILLIAM H. COX, for appellant.

MARTIN & MARTIN, for appellee.

PER CURIAM. — This is a suit by an employee against his employer to recover damages for an injury which he alleges he received through the negligence of the latter. The evidence in the case was submitted to the jury under instructions from the court, which resulted in a verdict in favor of the defendant. On appeal to this court, it was claimed that there was error in the rulings referred to in the first and second assignments, in the answer to the defendant's second point, and in the excerpts from the charge in the fourth to the eleventh assignments, inclusive. We are not convinced of error in the rejection of the offers of evidence which constitute the subject of the first and second assignments, or in the affirmance of the defendant's second point. In the eight excerpts from the charge nothing appears which can be construed as error. It is well to

there was any negligence in the case it was that of the plaintiff or his co-employee.

IN BRUCE *v.* PENN BRIDGE CO. *(Pennsylvania, October, 1900)*, 47 Atl. Rep. 354, the *per curiam* opinion stated the case as follows: " On the trial of this case the plaintiff's only contention was that Weigle was an incompetent workman, and that his incomptency was, or should have been, known to the defendant. No act of incompetency on the part of Weigle previous to the act complained of was shown, and it was not claimed prior to that time that any incompetency on his part was suggested or known to the defendant. All of his previous acts evinced care on his part, and could not well be considered as proof of incompetency in the performance of the duties pertaining to the work to which he was called. It follows from the evidence in the case that the defendant was not properly chargeable with negligence in employing him. That he used more than ordinary care in the performance of the work to which he was assigned was no evidence of incompetency. Nor did such care at any time impose additional liability on the defendant. Judgment affirmed."

remember, however, that the excerpts are to be considered with the charge, and that the excerpts which ignore the parts of the charge immediately preceding and following them are not reliable without inspection of the charge in its entirety.

Judgment affirmed.

BENIGNIA v. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, Pennsylvania, October, 1900.

EMPLOYEE INJURED IN COLLISION — FELLOW-SERVANT — RISK OF EMPLOYMENT. — In an action for damages for injury received by plaintiff while employed as a laborer on a construction train run into by a freight train through the negligence of a flagman connected with the construction train or of the engineer of the freight train, it was held that when the plaintiff accepted employment from the defendant, involving his transportation from place to place, injury by the negligence of any employee connected with the transportation of trains over the same road was clearly within the risks ordinarily incident to the service undertaken (1).

1. See note on COLLISIONS IN WHICH EMPLOYEES ARE INJURED, 8 AM. NEG. REP. 400–405.

See also note on ASSUMPTION OF RISK, 7 AM. NEG. REP. 97–111.

See also the following recent cases in which the question of Assumption of Risk is involved:

Employee slipping on sawdust floor and injured by hot oil — Assumption of risk. — In HATTAWAY *v.* ATLANTA STEEL AND TIN PLATE CO. *(Indiana, November, 1900)*, 58 N. E. Rep. 718, it appeared that plaintiff was injured while working in defendant's factory where he had been employed for several months. "At the time and upon the occasion heretofore mentioned [June 29, 1895] he went to the machine situated on the south side of the room to get this hook to use it in cleaning his machine, and thereupon discovered that it was not in its proper place in front of the machine, but had been placed in the rear thereof. In order to procure the hook it was necessary for plaintiff to pass over the narrow space between the wall and the vat and under the chain and windlass fastened to the wall. The machine on the south side of the wall had just been cleaned in the manner heretofore stated, and the receiving vat in its rear was filled with hot oil, and was uncovered and unprotected. The floor about this machine was completely covered with a layer of sawdust. In passing this vat, the plaintiff, without any fault or negligence on his part, stepped on some oil which had been spilled on the floor by the side of said vat, which oil had been covered over with sawdust so as to completely conceal it from view; and in so stepping plaintiff slipped and fell into the hot oil contained in the vat in question, and thereupon sustained the serious injuries of which he complains. The jury found a verdict for plaintiff for $3,000, but judgment was rendered for defendant upon the findings under the jury's answers to interrogatories. On appeal judgment was affirmed, it being held that plaintiff

APPEAL from Court of Common Pleas, Cambria County.

Action by Marotte Benignia against the Pennsylvania Railroad Company for injury received by plaintiff while employed as a laborer on a construction train run into by a freight train through the negligence of a flagman connected with the construction train, or of the engineer of the freight train. From judgment for defendant on a compulsory nonsuit, plaintiff appeals. *Judgment affirmed.*

assumed the risk of employment. The court said: "Appellant [plaintiff] is shown to have been a man of mature age, of ordinary intelligence, and familiar with all his surroundings. It is disclosed that for two months prior to the time of the accident it was the practice in appellee's factory for the employees therein to throw sawdust on the floor where it had been rendered slippery by reason of the grease or oil which had accumulated thereon. The sawdust, as the jury find, was used for no other purpose except to cover up such greasy places on the floor; and such sawdust, together with the open vats, was exposed to the full view of appellant and his associates engaged at work in the factory. Appellant made no complaint, it is shown, to the appellee, nor did he give it any information, that the practice of covering up such places upon the floor with sawdust rendered the same more dangerous."

Dangerous premises — Assumption of risk. — In SHANKE *v.* UNITED STATES HEATER CO. *(Michigan, December, 1900)*, 84 N. W. Rep. 283, action for damages for injuries to plaintiff received while at work in defendant's foundry, a verdict was directed for defendant which, on appeal, was affirmed. The negligence charged is that "the boards were unfit for the purpose, because they were uneven, unsound, rotten, unsafe, and defective, by reason of which the said path or paths or passageways upon said yard became and were in a dangerous and unsafe condition, and that for this reason the defendant did not provide a reasonably safe place for the plaintiff to work in." The manner of the accident is thus described in the declaration: "Plaintiff avers that while he was thus pulling said car, truck, or wagon in a careful, prudent, or diligent manner, he caught one of his feet on one of the planks or boards which lay in said path or passageway, and he was necessarily and unavoidably tripped, and stumbled." GRANT, J., said: "The theory of the declaration is not that sound inch boards were not sufficient, or that the ground was soft, but the sole theory of the declaration is that the boards were uneven, unsound, rotten, unsafe, and defective, in consequence of which the place was unsafe. Plaintiff cannot now recover upon the theory that sound boards were not sufficiently strong, or that the ground was soft, so that the ends of the boards would be pressed into it by the weight upon them. If, however, we assume that the declaration was sufficient, still plaintiff has no right of action. He was familiar with the character of the earth, and knew that the effect, when the wheel reached the end of a board, would be to press it down into the ground. This effect was as apparent to him as to any one. He and his co-employee were furnished with sufficient material to make the passageway safe. This is not a case of permanent passageways, upon which employees have a right to rely. The employees made such passageway for themselves, and could either have filled in at the ends of the boards with earth, or have placed a board underneath, or have put down two boards. The doctrine of safe place has no application to this case. The defendant was guilty

The following is the opinion of the lower court: "Nothing has been adduced on the argument of the above motion that convinces us there was error in sustaining the motion for a compulsory nonsuit made at the time of the trial. There is nothing in the case to distinguish it from many others of the same kind in which an

of no negligence. Whatever danger there was was apparent and assumed by the plaintiff. Judgment affirmed."

Dangerous premises — Night watchman injured — Assumption of risk. — In BODWELL *v.* NASHUA MANUFACTURING CO. *(New Hampshire, July, 1900)*, 47 Atl. Rep. 613, an action on case "for personal injuries alleged to have been received by the plaintiff while a night watchman in the defendant's mills by reason of its neglect to provide him a safe place in which to work, the plaintiff's evidence tended to prove that on the night in question his way was obstructed by some planks which had been insecurely piled by carpenters during the preceding day; that he saw the planks, and walked safely over them once, but on his return caught his foot and fell; that his view was obscured by escaping steam, and that a week before the defendant had promised to repair the pipe from which the steam escaped, but had failed to do so. There was no evidence that the plaintiff suggested that the escape of the steam made his work more dangerous, or that he thought of quitting the employment unless repairs were made. A nonsuit was ordered, subject to exception." PEASLEE, J., in his opinion, said: "If there were any dangers which contributed to the plaintiff's injury of which he was not fully informed, they were caused by the acts of his fellow-servants. Nash *v.* Steel Co., 62 N. H. 406. The promise to repair was not shown to have any connection with the plaintiff's continuation in the employment. 'No case * * * has gone so far as to hold that, where the servant does not complain on his own account, and continues in the employment with full knowledge of the risk, he can recover of the master, because the latter, when the defective condition was called to his attention by the servant, gave assurances, which did not induce the servant to remain, that the defect should be remedied.' Lewis *v.* Railroad Co., 153 Mass. 73, 77, 26 N. E. Rep. 431. Exception overruled."

Boy injured by machinery — Assumption of Risk. — In CARRINGTON *v.* MUELLER ET AL *(New Jersey Err. & App., November, 1900)*, 47 Atl. Rep. 564, judgment of nonsuit was affirmed in action by plaintiff, thirteen years old, for damages for loss of the first two fingers of his right hand, which were cut off by the knife of "an egg noodle cutting machine," at which he was working as a servant of defendant. The syllabus by the court is as follows: "Minor servants are held to assume, by their contract of employment, those ordinary risks of their service that are obvious to them, or that have been pointed out to them in a manner suited to their youth and inexperience.

"In order to charge a master with negligence in permitting the use by a minor servant of a machine, the ordinary danger of which was obvious, something more must be shown than the fact that the machine by its unusual and unaccountable behavior upon a single occasion injured the plaintiff in a way that was not obvious. Something in the nature of scienter must be proved, from which it may be inferred that the master by the exercise of reasonable caution could have apprehended such an occurrence."

employee is injured by the negligence of a fellow-employee, excepting that this case is free from doubt on the main question. The burden of proving that his injury resulted from the negligence of the defendant was on the plaintiff. Railroad Co. *v.* Smith, 125 Pa. St. 259, 17 Atl. Rep. 443, and cases there cited. If there was any proof of negligence on the part of any one in this case, it is so clear as to permit of no discussion that it was on the part of some one engaged in a common employment with him, and, therefore, under all the decisions in this State and elsewhere, the employer cannot be held responsible. Whatever the law may be in other States, either under the decisions or statutes, the law of this State has been well settled, and cannot be now questioned, that where several persons are employed as workmen in the same general service, though in different parts or departments of it, or though one may be in an inferior position to the other, and one of them is injured by the carelessness of another, the employer is not responsible, unless he has employed unfit persons for his service. Ryan *v.* Railroad Co., 23 Pa. St. 384; Caldwell *v.* Brown, 53 Pa. St. 453; O'Donnell *v.* Railroad Co., 59 Pa. St. 246. 'The rule rests upon the sound principles that each one who enters upon the service of another takes on himself the ordinary risk of the employment in which he is engaged, and the negligent acts of his fellow-workmen, in the general course of his employment, are within the ordinary risks.' Coal Co. *v.* Jones, 86 Pa. St. 432; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. Rep. 514. When the plaintiff accepted employment from the defendant, involving his transportation from place to place, injury by the negligence of any employee connected with the transportation of trains over the same road was clearly within the risks ordinarily incident to the service undertaken."

DONALD E. DUFTON and FRANCIS P. MARTIN, for appellant.

ALVIN EVANS and H. W. STOREY, for appellee.

PER CURIAM. — At the close of the plaintiff's evidence in this case, the defendant's counsel moved for and obtained a compulsory nonsuit, on which the plaintiff's counsel moved the court to take it off. Upon due consideration of the plaintiff's motion, the court refused to take off the nonsuit, and an appeal was taken to this court. On a careful examination of the evidence submitted by the plaintiff, we are convinced that he failed to establish his claim against the defendant, and that the court committed no error in granting the nonsuit or in refusing to take it off. We therefore rest our affirmance of the nonsuit on the opinion of the learned court below overruling the motion to strike it off.

Judgment affirmed.

EAST TENNESSEE AND WESTERN NORTH CAROLINA RAILROAD CO. v. CARGILLE.

Supreme Court, Tennessee, November, 1900.

CHILD INJURED ON TURNTABLE — DANGEROUS MACHINERY — LIABILITY OF RAILROAD COMPANY. — Where a railroad company leaves a turntable or other like machinery upon its property, or under its control, likely to attract children, so unsecured that children may put it in motion, the company is negligent, and if a child is injured thereby, will be liable in damages (1).

APPEAL from Law Court of Johnson City.

Action by J. W. Cargille, by next friend, against the East Tennessee and Western North Carolina Railroad Company. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

H. H. CARR, for appellant.

BURROW BROS. and ISAAC HARR, for appellee.

WILKES, J. — This is an action for damages for personal injuries to the plaintiff, who was at the time of the accident a minor six years of age, and at the time of bringing this suit was still a minor. There was a trial before the judge and a jury in the court below, and a verdict and judgment for $250, and the railroad company has appealed, and assigned errors. The injury was done in 1886. This suit was brought in 1895. The declaration was filed August 26, 1895. It was demurred to. When this demurrer was filed does not appear, but it was overruled December 17, 1895. A plea of not guilty was filed December 21, 1895. The cause appears to have slumbered on the docket until April 17, 1899, when an amended declaration was filed. It was also demurred to on the day it was filed, and the second demurrer was overruled on the 18th of April, and defendant was given thirty days in which to plead to the second count. No plea to this second count was ever filed, nor was judgment by default taken upon it, but the cause proceeded to trial, as the entry states, upon the issues, with the result as stated. A motion for a new trial was made and overruled, and an appeal was prayed and granted, and time given to file a bill of exceptions, but none was ever filed. Defendant excepted to the action of the court in overruling his demurrers. There being no bill of

1. For other actions arising out of Turntable Accidents, from 1897 to date, see vols. 1–9 AM. NEG REP., and the current numbers of that series of REPORTS.

exceptions in the case, the action of the court upon the demurrers is the only matter we can consider.

We are of opinion the amendment to the declaration incorporated itself into the original, and became part of it, and, the defendant having filed no other or further plea to it, the plea to the original declaration will be treated as putting the entire matter of both declarations in issue.

The original declaration, in substance, alleges that the railroad company wrongfully and negligently left unattended, unlocked, unfastened, unguarded, and uninclosed a certain piece of dangerous and attractive machinery, viz., a turntable, and it was its duty not to so leave it, but to keep the same well secured against those for whom it served as an attraction, thereby holding out to plaintiff and others an inviting and attractive piece of dangerous machinery, viz., a turntable, a ponderous piece of machinery, resting on a pivot, and easily revolved, being on heels at each end; that plaintiff, being an infant of tender years (six years), in company with his mates, while playing with and revolving the table, was caught between the end of the turntable and the end of the iron or steel rail, whereby his foot was mashed, bruised, mangled, etc. The amended declaration further alleged that the turntable was located in the central part of the town of Johnson City, near the intersection of two public streets, and at a place much frequented by people in passing and repassing, with full knowledge that the same was an inviting and dangerous piece of machinery when unlocked or unguarded, and with full knowledge that small boys and youths were in the daily habit of riding and revolving on the same, whereby, and by reason of the negligence of defendant in not taking reasonable precaution for preventing small boys from playing upon and about its turntable, and in not locking and securely fastening the same, the plaintiff's foot was caught and crushed, etc. The demurrers were, in substance, that the declaration was not sufficient in law, there being no cause of action stated; the law not requiring defendant to keep its said turntable locked, fastened, guarded, and inclosed, nor to keep the same well secured, against those for whom it served as an attraction, etc.

It is objected that the demurrer is formal, and does not specify the defects in the declaration. This, we think, is not correct. The demurrer is sufficient and regular in form, and we proceed to consider if it is sufficient in substance.

The general rule adopted by the Supreme Court of the United States and the courts of most of the States of the Union, is that if a railroad company leaves a turntable or other like machinery upon

its ow property, or under its control, likely to attract children, so unsecured that children may put it in motion, the company is negligent, and if a child is injured thereby, will be liable in damages. Railroad Co. *v.* Stout, 17 Wall. 657, 21 L. ed. 745, 27 Am. and Eng. Encyc. of Law, 344, and cases there cited. The declaration is not, therefore, faulty upon the grounds stated in the demurrer, and we can see no error in the action of the trial judge in overruling the demurrers, and proceeding to trial upon the original and amended declarations and plea thereto, treating it as putting both the original and amended declarations in issue. There being no bill of exceptions, we must assume there was no error in the trial, verdict, and judgment, and the judgment is affirmed, with costs.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY v. ADAMS.

Supreme Court, Texas, October, 1900.

CONDUCTOR INJURED IN COLLISION — VIOLATION OF RULES—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In an action to recover damages for injuries received by plaintiff, a conductor of one of defendant's freight trains, it appeared that the train on which plaintiff was employed stalled on a grade and was standing on a curve so that persons engaged at either end could not see those engaged at the other end of it. A switch engine was attached to the front of the train to aid it in getting over the grade. A freight train belonging to another company was on the same track behind plaintiff's train, and plaintiff not knowing the switch engine was attached to the front of his train, called upon the engineer of the train behind him to couple to the rear of his caboose, which was done, and both engines moved at the same time, and the plaintiff's train suddenly stopped, causing the engine behind to run into the caboose, on the platform of which was plaintiff, and plaintiff's leg was injured. It was shown to be a custom of switch engines to render, and of conductors to request, assistance under similar circumstances. Defendant claimed that plaintiff had no authority over his train at the time of the accident, as by its rules, it was in charge of the yardmaster, and, therefore, plaintiff was not entitled to recover. *Held*, that the question raised by defendant as to plaintiff's contributory negligence was for the jury to determine (1).

ERROR to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by T. T. Adams against the Galveston, Harrisburg and San Antonio Railway Company. From a judgment of the Court of

1. See note on COLLISIONS IN WHICH EMPLOYEES ARE INJURED, 8 AM. NEG. REP. 400-405.

Civil Appeals (55 S. W. Rep. 803) affirming a judgment in favor of plaintiff, defendant brings error. *Judgment affirmed.*

BAKER, BOTTS, BAKER & LOVETT and A. L. JACKSON, for plaintiff in error.

A. C. ALLEN, EDGAR WATKINS, and FRANK. C. JONES, for defendant in error.

BROWN, J. — On the 25th day of March, 1898, T. T. Adams was in the employ of the Galveston, Harrisburg and San Antonio Railway Company as conductor on one of its freight trains, and received injuries under the circumstances hereafter stated. The train on which he was employed arrived at Houston, and, having entered the yards, stalled on a grade. The train was standing upon a curve, and persons engaged at either end could not see those engaged at the other end of it. The foreman of a switch crew employed in the yard by the plaintiff in error attached a switch engine to the front of the engine of that train to aid it in getting over the grade. It was proved, and, so far as we have been able to see, is undisputed, that it was the custom in that yard for a switch crew to go to the aid of a train under similar circumstances, and by attaching the switch engine to the locomotive, or to the rear of the train, as circumstances required, to assist it into the yards. It was also proved that it was the custom of conductors upon that railroad, under similar circumstances, to call upon the engineer of another train, if convenient, to aid the stalled train in passing the grade. The evidence upon this point cannot be said to be undisputed, but it was sufficient to justify a finding of the jury in favor of such authority and custom. A freight train belonging to the San Antonio and Aransas Pass Railway Company was upon the same track, behind the train on which Adams was conductor, using that track by agreement between the companies. The latter train could not proceed until Adams' train had passed over the grade. Adams, not knowing that the switch engine was attached to the front of his train, called upon the engineer of the train behind him to couple to the rear of his caboose, and to aid him by pushing his train up the grade. The coupling was made, the signal given, and both engines seemed to move at the same time, causing the train to move forward for several car lengths, when suddenly the train on which Adams was came to a halt, which caused the engine behind the caboose to run into and to break the platform of the caboose off. Adams was at the time upon the platform of the caboose, trying to draw the pin by which the following engine was coupled to his caboose; and when the platform was broken his leg was caught between the engine and the caboose, and so injured as to make amputation necessary. The

timbers of the platform were decayed, which caused it to break in the collision. The sudden stopping of the train of which Adams was conductor was caused by the engineer applying the emergency air brake, which was forbidden by the rules of the company, except "to prevent a wreck or derailment or to save life or property." There is no evidence that a wreck or derailment was impending, or that life or property was endangered. It was claimed by the defendant below, and is urged here by assignment, that Adams had no authority over the train at the time and place when he received his injury, but that the same was, by the rules of the company, in charge of the yardmaster; but upon this issue the evidence was conflicting, and sufficient to have sustained a verdict either way. The case was tried before a jury, and judgment rendered for the plaintiff, Adams, for $15,000, which was affirmed by the Court of Civil Appeals.

The writ of error was granted in this case upon the assignment based on the following charge: "You are charged in this connection, however, that if you find that there was negligence on the part of those operating the San Antonio and Aransas Pass Railway Company's train, but that the injury, if any, was the joint result of such negligence on the part of those operating the San Antonio and Aransas Pass train, and of such negligence, if any, of the engineer or fireman of the defendant as, under the fifth paragraph of this charge, would authorize a recovery, or was the joint result of negligence on the part of the San Antonio and Aransas Pass Railway Company, or those operating its train, and of such defects of the platform or caboose, if any, as you have been instructed would, under the second paragraph of this charge, authorize a recovery, then, should you so find, you are instructed that in such an event the fact that negligence on the part of the San Antonio and Aransas Pass Railway Company or its employees co-operated in causing the injury would not be a defense to the defendant." We were of the opinion that the plaintiff should be held responsible for the negligence, if any, of the persons he called to his aid, if such negligence contributed to the injury that he received. We do not intend to intimate an opinion as to what would be the rule in such case, for, upon a careful examination of the facts, we find no evidence of any negligence on the part of the servants of the San Antonio and Aransas Pass Railway Company. There being no negligence by those servants, the charge could not operate to the injury of the defendant.

The plaintiff in error presents, in different forms, the proposition that a servant who, in discharging his duties, disobeys the regulations

of his master, is guilty of negligence *per se*, and if injured, and the act which violates such rules contributes to the injury, no recovery can be had. This rule would give to regulations of the master the force of statutory enactments. We do not understand the law to be consistent with that contention. If a violation of a rule shows conclusively that the servant cannot recover under the facts of the case, the question of contributory negligence becomes a question of law to be decided by the court. If, however, under the facts of the particular case, there might be a phase in which the servant would be justified or excused in disregarding the rule of the company, then it becomes a question for the jury to determine whether such act is negligence; that is, whether, under all the circumstances, a reasonably prudent person would have done as the plaintiff in this case did. Dunlap *v.* Railroad Co., 130 U. S. 649, 9 Sup. Ct. Rep. 647, 32 L. Ed. 1058; Railway Co. *v.* Sweeney (Tex. Civ. App.), 36 S. W. Rep. 800; Bonner *v.* Bean, 80 Tex. 155, 15 S. W. Rep. 798. The general rule of law is that contributory negligence is a question of fact to be found by the jury, and the facts of this case do not take it out of that rule.

We do not think it necessary to discuss the different assignments embraced in the application for the writ of error. We find no error in the judgment, and it will be affirmed.

TEXAS CENTRAL RAILROAD COMPANY v. FOX.

Court of Civil Appeals, Texas, October, 1900.

EMPLOYEE INJURED BY DEFECTIVE APPLIANCE ON HAND CAR — BURDEN OF PROOF — INSTRUCTION. — In an action to recover damages for injuries to plaintiff, an employee of defendant, while operating a hand car, the handle having broken, where the court charged that the burden was on plaintiff to prove the cause of the break, it was not error to refuse to instruct the jury to return a verdict for defendant if they could not determine from the evidence what caused the handle to break (1).

APPEAL from District Court, Tarrant County.

Action by Arthur Fox against the Texas Central Railroad Company to recover for injuries sustained. From a judgment in favor of plaintiff, defendant appeals. *Judgment affirmed.*

1. For other actions arising out of Accidents from Defective Appliances and Injuries to Railroad Employees, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

L. W. CAMPBELL and TARLTON & AYRES, for appellant.

WYNNE, MCCART & BOWLIN, for appellee.

STEPHENS, J. — Appellee, a servant of appellant, was engaged with other servants in operating a hand car belonging to appellant, when the handle broke, and he was thrown off and run over, thus sustaining severe injuries, for which he recovered a verdict and judgment in the sum of $3,500, from which this appeal is prosecuted.

The testimony relied on by appellee tended to show, and warranted the jury in finding, that the handle which broke was decayed, and that this caused it to break, and that appellant was guilty of negligence in not discovering and remedying the defect. On the other hand, the evidence relied on by appellant tended to show that the handle was sound, or at least that it had been duly inspected, and that whatever defect may have existed was latent, and not discoverable by the exercise of ordinary diligence. The defect was unknown to appellee, and was not such as he was required to take notice of, and he was free from negligence, unless the position he took upon the car was such as a person of ordinary prudence would not have taken under the same circumstances. The evidence warranted the jury in finding him free from negligence in this respect, also, or at least that his position upon the car was not the proximate cause of the injury. These issues were all correctly submitted to the jury in the charge of the court, and the special charges requested by appellant were all properly refused. Of these special charges, the fifth only need be noticed, in which appellant sought to have the jury instructed to return a verdict in its favor if they could not determine from the evidence what caused the handle to break. In Byers *v.* Wallace, 87 Tex. 503, 28 S. W. Rep. 1056, 29 S. W. Rep. 760, it was held by our Supreme Court that a somewhat similar charge (special charge No. 2) should have been given, but in that case no charge was given on the burden of proof, and this, under the peculiar features of that case, seems to have had controlling influence. In the case at bar the charge of the court distinctly placed the burden of proof on appellee, and we are of the opinion that no more was required.

Finding no error in any of the rulings complained of, we affirm the judgment.

FOLK v. CITY OF MILWAUKEE.

Supreme Court, Wisconsin, December, 1900.

DEATH OF SCHOOL PUPIL FROM SEWER GAS — DEFECTIVE SEWER — CITY NOT LIABLE. — In an action to recover damages for the death of plaintiff's daughter, a pupil in a public school, caused by sewer gas from a defective sewer, it was held that defendant was not liable, under the rule that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers where it is engaged in the performance of a merely public service (1).

APPEAL from Superior Court, Milwaukee County.

Action by John Folk, administrator, against the City of Milwaukee. From a judgment for defendant, plaintiff appeals. *Judgment affirmed.*

"This is an action brought by the administrator of the estate of Florence Folk to recover damages for the death of said Florence, caused by the negligence of the defendant. The complaint alleged the death of Florence Folk, the intestate, on the 16th day of February, 1897, at the age of seventeen years; that she left surviving as her sole heirs at law, her father and mother; that the plaintiff was duly appointed administrator of her estate on the 20th of November, 1897, and has duly qualified as such; that during certain months of the year 1896 the deceased, Florence Folk, was lawfully attending school at one of the public-school buildings owned and maintained by said City of Milwaukee, and that while so attending, without fault or negligence on her part, she was made sick by sewer gas which escaped from the sewer in said building by reason of the fact that such sewer was negligently and carelessly allowed to become out of repair and clogged up, with the knowledge of the city authorities, so that it failed to carry off the refuse matter contained in it, thereby creating a nuisance; that said Florence Folk died February 16, 1897, in consequence of sickness caused by said poisoning; that notice of the claim was served on the city officers January 14, 1898. A general demurrer to this complaint was sustained, and the plaintiff appeals."

TOOHEY & GILMORE, for appellant.

CARL RUNGE (C. H. HAMILTON, of counsel), for respondent.

WINSLOW, J. (after stating the facts). — The question is whether a city is liable for the death of a child lawfully attending one of its

1. See also Hughes *v.* City of Auburn, 161 N. Y. 96, 7 Am. Neg. Rep. 139, action for death of person caused by sewage odors.

public schools, when such death is caused by negligently allowing the sewer of the school building to become clogged up. We think this question must be answered in the negative. This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers where it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by the law for the general welfare of the inhabitants or of the community. Hayes *v.* City of Oshkosh, 33 Wis. 314. The case cited was one where the negligence claimed was the negligence of firemen in the discharge of their duty, and the same principle has been applied to the acts of taxing officers, policemen, and health officers. Wallace *v.* City of Menasha, 48 Wis. 79, 4 N. W. Rep. 101; Kuehn *v.* City of Milwaukee, 92 Wis. 263, 65 N. W. Rep. 1030; Kempster *v.* City of Milwaukee, 103 Wis. 421, 79 N. W Rep. 411. That the city is performing such a public duty in maintaining public schools cannot be doubted. The principle is thus stated in 1 Shear. & R. Neg. (5th ed.), sec. 267: "The duty of providing means of education at the public expense by building and maintaining school houses, employing teachers, etc., is purely a public duty, in the discharge of which the local body, as the State's representative, is exempt from corporate liability for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein." The leading case upon the subject is probably the case of Hill *v.* City of Boston, 122 Mass. 344, where the whole field was very learnedly and exhaustively discussed. This case has been followed in principle by other courts. Wixon *v.* Newport, 13 R. I. 454; Donovan *v.* Board, 85 N. Y. 117; Hughes *v.* City of Auburn, 161 N. Y. 96, 7 Am. Neg. Rep. 139, 55 N. E. Rep. 389; Ford *v.* School Dist., 121 Pa. St. 543, 15 Atl. Rep. 812, 1 L. R. A. 607; Finch *v.* Board, 30 Ohio St. 37. While the exact question here presented is new in this court, the weight of authority (especially in Massachusetts, from which State we have so largely taken our doctrine as to municipal liability for torts) is so strong in favor of the rule quoted above that we feel no hesitation in following it. Nor is the rule unreasonable. Indeed, were a recovery possible under the facts stated here, no reason is perceived why damages might not be allowed for every sickness suffered by a scholar which could be traced to defective or injudicious heating, ventilation, or lack of ventilation of a school building. Such a result would be intolerable, and might necessitate the closing of schools, by the exhaustion of funds to discharge such judgments.

We do not lose sight of the fact that there is another principle frequently approved by this court, namely, that a municipal corporation may not construct or maintain a nuisance in the street or upon its property to the damage of another, or negligently turn water or sewage upon the lands of another without liability. Gilluly *v.* City of Madison, 63 Wis. 518, 24 N. W. Rep. 137; Hughes *v.* City of Fond du Lac, 73 Wis. 380, 41 N. W. Rep. 407; Schroeder *v.* City of Baraboo, 93 Wis. 95, 67 N. W. Rep. 27. These cases all go upon the principle that the city cannot in the management of its corporate property create a nuisance injurious to the property or rights of others. In none of these cases were the city officers who were guilty of negligent or wrongful acts acting in a governmental capacity towards the person injured. In the present case, however, there can be no doubt that in the management of the school house the city officers were acting in a purely governmental capacity, as far as their relations to the deceased child were concerned. This consideration is, we think, controlling, and results in affirmance of the ruling of the trial court.

Order affirmed.

BOLIN v. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

Supreme Court, Wisconsin, December, 1900.

TRESPASSER KILLED BY JUMPING FROM TRAIN — WILFUL INJURY BY TRAINMEN — LIABILITY. — 1. In an action to recover damages claimed to have been caused by actionable negligence of the defendant, contributory negligence of the plaintiff, however slight, precludes his recovering damages, notwithstanding negligence of the defendant, however great, contributed thereto.

2. If a person injure another, either actually or constructively intending to do so, the injury is not attributable strictly to negligence, but to that degree of violence called wilful misconduct in the law, which this court has classed as gross negligence, though it has no element of inadvertence, a necessary element of negligence.

3. If an injury be wilfully inflicted within the meaning of the rule last stated, contributory negligence on the part of the injured person will not preclude his recovering damages therefor; neither will the fact that he was, at the instant of receiving such injury, a wilful trespasser upon the property of the person guilty of the wilful act.

4. A railway company is not obliged to stop its train before requiring a wilful trespasser thereon to cease his unlawful conduct.

5. If a railway train be not going at a dangerous rate of speed for a trespasser thereon to leave it, having regard to existing circumstances and the general

custom of persons of his class in respect to boarding and leaving such trains while moving, and he cease the trespass by jumping from the train pursuant to the command of a trainman unaccompanied by any act of such trainman reasonably calculated to cause such trespasser to lose his self-control, the circumstances will not tend to show intent on the part of such trainman to commit a wilful injury (1).

6. It is not sufficient to warrant a reasonable inference of that intent necessary to a wilful injury to show that the alleged guilty party ought reasonably to have anticipated that such a result was merely within reasonable probabilities, else mere want of ordinary care would have that effect. To warrant such inference the circumstances must be such that a man of ordinary intelligence would expect such an injury to occur.

7. If a trainman command a wilful trespasser, riding on the bumpers of a freight train moving at the rate of four or five miles an hour, and whom such trainman has reasonable ground to believe is skilled in jumping on and off trains under the existing circumstances, no means reasonably calculated to cause such trespasser to lose his self-control being used to enforce the command, an intention to injure such trespasser, necessary to a wilful injury, cannot reasonably be inferred therefrom.

(Syllabus by the Judge.)

APPEAL from Circuit Court, Eau Claire County.

Action by Peter J. Bolin, administrator, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. From judgment for defendant, plaintiff appeals. *Judgment affirmed.*

"Action to recover damages for the death of Christ Peterson, alleged to have been caused by the wrongful conduct of the servants of the defendant in charge of one of its trains, for which conduct it was claimed defendant was liable. The deceased and his brother started from a place called Foxboro to beat their way on trains to their homes near Black River Falls, Wis., a distance of several hundred miles. After journeying about five days, riding sometimes on one train and sometimes on another, as they could secure an opportunity, and without paying any railroad fare, on some occasions riding by permission of the trainmen and on others secreting themselves upon the train, they arrived at the station of Chippewa Falls. From there they went to Eau Claire on a street car. On the night of December 10th, with other persons to the number of about ten, who were in the same business of beating their way upon

1. For other actions relating to Trespassers and Other Persons Injured by Jumping from Trains, etc., from the earliest period to 1897, see vols. 2-7 Am. Neg. Cas., in connection with Accidents while Alighting from or Boarding Cars, etc. Actions relating to Ejection of Persons from Trains, etc., are reported in 8 Am. Neg. Cas., where the same are chronologically grouped from the earliest period to 1897, and arranged in alphabetical order of States. Subsequent actions on the same topics, from 1897 to date, appear in vols. 1-9 AM. NEG. REP., and the current numbers of that series of REPORTS.

railroad trains, they boarded an east-bound passenger train at the Eau Claire station, each of such persons secreting himself on the train as best he could, the deceased and his brother locating themselves on the front end of a mail car. At Rosedale station, some distance east of Eau Claire, they were all compelled to leave the train. From there the deceased and his brother walked on the track to Augusta, a station further east, at which place they boarded a freight car in which there were other persons who were beating their way. It was a stock car and the men all went inside. When the train arrived at Fairchild the car occupied as aforesaid was set out on a side track, whereupon the deceased and his brother and their associates left the car. The two Petersons, with one or more of the others mentioned, then went upon the depot platform and waited for an opportunity to again board the train when it was made up and ready to proceed east. While on the platform one of the men who accompanied the Peterson boys suggested that they should not all keep together, whereupon the Petersons went by themselves. They stepped down upon the ground upon the right-hand side of the train, and just before or as it started to move east they boarded it by taking hold of the grab irons that were on the ends of the cars and climbing up onto the bumpers, one securing a place on each car. When the train had proceeded a short distance and had not yet left the depot platform, the conductor walked along on the ground on the left-hand side of the train for the purpose of discovering and ridding his train of trespassers. The train was then moving about four miles an hour. He discovered the Peterson boys located as aforesaid and commanded them in a sharp tone of voice and with some profane language, swinging his lantern between the cars at the same time, to jump off the train. They obeyed the command. The deceased went out on the grab irons first and jumped for the platform, and his brother followed. As the deceased struck the platform he slipped, or in some manner lost control of himself, and fell under the wheels of the moving car, and was so badly injured that he died a few days afterwards. Some of the persons who were associated with the Peterson boys in the stock car had secreted themselves on the train before such boys were compelled to leave it, two of such persons being on the bumpers of the front end of the car forward of the Peterson boys. They observed the conductor or brakeman looking for trespassers and jumped off the train just before the Peterson boys left it. One of them testified on the trial, saying that the train was going three or four miles an hour, or four or five miles an hour, and that, after they were compelled to leave the train, and as they were running along the side watching for an

opportunity to get on again, they saw the Peterson boys jump off. A short time after the accident happened the survivor of the Peterson boys made a statement of the circumstances of the injury to his brother, to be taken down in writing. Such statement was to the effect that while they were on the bumpers of the train it started; that it had gone only a few rods when they were commanded to get off the train, the man saying, 'Get off, boys, God damn you, hurry up and get off.' There was other evidence substantially all to the effect that the speed of the train when the Peterson boys jumped off was not more than four or five miles an hour, or such that a person could walk and keep up with it. There was undisputed evidence that the class of men who beat their way on railroad trains customarily jump on and off trains when they are moving at a greater speed than four miles an hour; that when a train is going at such greater speed it is common for such class of men to get upon the bumpers of the cars, catch onto the truss rods, crawl upon the truck beams and secrete themselves on the trains in other ways; that when such men are discovered, they will, unless permitted to ride, customarily drop or jump off the train.

"The jury rendered a special verdict substantially as follows:

"1. The conductor ordered the deceased and his brother to leave the train, striking at them with the lantern which he carried in his hand.

"2. The conductor ordered the deceased and his brother from the train, accompanying the order with an oath.

"3. Because of the position the conductor was in when he ordered the deceased off the cars, the manner in which he was dressed, the fact that he had a lantern in his hands, the distance from him to the deceased, the words used by him, and all the circumstances, the deceased jumped from the car because of a reasonable apprehension of immediate physical force being used to eject him, the violently threatened force being sufficient to impress a reasonable person with the belief that there was imminent danger of its being employed.

"4. The circumstances existing at the time the deceased was compelled to leave the train were such as to imperil his personal safety.

"5. The train was moving at the rate of three or four miles an hour.

"6. The conductor exercised his authority of removing passengers from the train in an unreasonable, imprudent and improper manner, and without proper regard to the safety of the deceased.

"7. The act of the conductor was the proximate cause of the injury to the deceased.

"8. The conductor was guilty of reckless or wanton conduct in compelling the deceased to leave the car under the circumstances.

"9. Such reckless or wanton conduct was the proximate cause of the injury.

"10. The conductor, under the circumstances, ought reasonably to have anticipated that his conduct would cause an injury to the Peterson boy.

"11. The Peterson boy was not guilty of any want of ordinary care which contributed directly to the accident.

"12. 'We assess the damages recoverable for the benefit of the estate at $5,000.'

"Upon motion of defendant the verdict was amended by striking out the affirmative answer to the eighth question, substituting a negative answer therefor, and upon the verdict so amended the defendant moved the court for judgment. The motion was granted and judgment was entered accordingly, from which plaintiff appealed."

W. H. FRAWLEY (W. F. BAILEY, of counsel), for appellant.

H. H. HAYDEN and PIERCE BUTLER (THOMAS WILSON, of counsel), for respondent.

MARSHALL, J. (after stating the facts). — The reasons urged by counsel for appellant for a reversal of the judgment appealed from may properly be reduced to the following: Plaintiff's cause of action depended upon whether the defendant's conductor was guilty of gross negligence as found by the jury in answer to the eighth question. With that fact established the right to recover was complete regardless of whether plaintiff was or was not guilty of contributory negligence. Evidence was produced permitting of a reasonable inference in accordance with the answer to such eighth question, so that it was error on the part of the trial court to treat such answer as erroneous and give judgment for defendant upon the ground that there was no evidence that brought the fact so found within reasonable probabilities.

The idea plainly contended for, in the first proposition mentioned, is that, if a person be injured by the concurrence of two proximate causes, one want of ordinary care on the part of such person and one gross negligence on the part of another, legal damages result. To support that theory the learned counsel has drawn liberally from the adjudications of other courts, many of which have either followed fully or in part the doctrine of comparative negligence, which finds its most significant source in Davies *v.* Mann, 10 Mees. & W. 546 (1),

1. In Davies *v.* Mann, 10 M. & W. 546, an action for killing an ass, which the declaration alleged to have been lawfully upon the highway when it met its death, it appeared that the animal, fettered by the forefeet, had been

and has referred to adjudications of this court, which are made to appear consistent with such foreign adjudications. The doctrine referred to, so far as it permits a recovery of damages as the result of a negligent act to turn on a comparison of the negligence of the plaintiff with the negligence of the defendant, however great the latter may be, within the boundaries of negligence strictly so called, and however slight the former may be if it only pass the boundaries of want of ordinary care, is not now and never has been a part of the law of this State, though it is true there are many expressions here and there, in opinions in cases decided, where the term "negligence" has been used as descriptive of wrongful conduct that was beyond the scope of the term "negligence" as it is ordinarily understood, which have led to some misunderstanding as to what the law really is. Some of such cases have, by the learned counsel for appellant, been brought significantly to our attention.

It seems necessary at this time to take a general view of the decisions of this court in respect to counsel's contention that gross negligence permits a recovery of damages resulting therefrom notwithstanding contributory negligence of the sufferer. By doing so we shall, we venture to say, make it clearly appear that any degree of negligence, strictly so called — wrongful conduct which springs from inadvertence to any extent, whether of an active or passive character — does not preclude the successful interposition of contributory negligence as a defense; while wilful misconduct, so concurring, does have that effect, such wilful wrong being what is sometimes referred to as wilful, malicious or wanton, evincing intention to do an injury to another — wrongful conduct which renders the guilty party properly liable to a claim for punitory damages and which does not fall within the scope of the term "negligence," though the term "gross negligence" has been so extended by this court and some others as to include it.

In Stucke *v.* Railroad Co., 9 Wis. 202, the earliest case in this court where the subject under discussion was treated to such an extent as to influence the subsequent judicial history of the State, the rule above indicated was not stated sufficiently strong to fully satisfy what has been said, though the facts of the case fully warranted it. A locomotive engineer caused his engine to collide with

placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's wagon, which, without its driver, was coming at a smartish pace along the road. *Held*, that the jury was properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover.

a cow on the railway track and kill her, under such circumstances as to clearly indicate an intention to produce that result. It was not an act of negligence, but a wilful act, as that term is ordinarily used in the law, indicating intention. There was no reasonable ground to say that the engineer's act was characterized by any element of inadvertence. The court, in discussing his conduct, called it "gross negligence," but demonstrated what was meant thereby by quoting with approval Lord Denman, C. J., in Lynch *v.* Nurdin, 1 Adol. & E., N. S., 28, 41 E. C. L. 422 (1), to the effect that the boundary line between wilful mischief and gross negligence is so hard to trace that it cannot be discovered with judicial certainty. "The law blends one into the other and considers that gross negligence indicates, to some extent, malice." That was followed in another paragraph by a general observation as to the law which did not accurately measure the facts of the case, nor come up to the standard of wrongful conduct which Lord Denman placed within the scope of the term "gross negligence" which is necessary to preclude the defense of contributory negligence. Such general observation, if it did not clearly enter the domain of comparative negligence, came dangerously near its boundaries. We refer to the following: "Where the facts show such degree of rashness or maliciousness on the part of the servants of the company as to evince a total want of care for the safety of the cattle or willingness to destroy them [there is no trouble up to that point], though such destruction may not have been intentional [there is the difficulty, if the word 'intentional' be understood in any other sense than premeditated design], we think it is no departure from justice or principle to hold the company responsible unless it appears that the plaintiff was equally negligent." However, that the court did not decide that negligence, strictly so called — even gross negligence, except as that term was extended to include wrongful acts

1. In Lynch *v.* Nurdin, 1 Ad. & El. N. S. 28, 29, it was held that the rule of law, that a plaintiff who has contributed to an injury, occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. Where, therefore, the defendant's servant left a horse and cart unattended in a public street, and a child under seven years of age, during his absence climbed on the wheel, and other children urged forward the horse whereby he was thrown to the ground and the wheel fractured his leg: *Held*, that the jury was justified in finding a verdict for him, if of opinion there was negligence on the part of the servant. *Held*, also, that the co-operation of third parties in the injury was not a ground of defense, if the means of injury were negligently left where it was extremely probable that they would be set in motion.

not characterized by any degree of mere inadvertence — precludes the defense of contributory negligence, was demonstrated by many decisions thereafter rendered, in some of which the learned Chief Justice who wrote the opinion participated and pronounced the judgment of the court, and in none of which was it found necessary to even criticise the Stucke Case.

In Potter *v.* Railroad Co., 21 Wis. 377 (1), an instruction given to the jury by the trial court, to the effect that if the plaintiff was guilty of slight want of ordinary care (the word "negligence" was used, but in subsequent cases corrected), contributing to his injury, he can nevertheless recover if the defendant was guilty of gross negligence which was also a contributing cause, was condemned, the court announcing the true rule of law to be that negligence (meaning want of ordinary care), however slight, contributing to the injury, prevents a recovery therefor. The language of Judge Downer in the Potter Case was quoted with approval in Cunningham *v.* Lyness, 22 Wis. 236, with the remark that, "Substantially the same principle has been decided by the court in many cases, that a party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause." To that all previous cases on the subject were cited, commencing with the Stucke Case.

In Ward *v.* Railway Co., 29 Wis. 144, opinion written by Dixon, C. J., the Potter Case was again referred to with approval, this language being used: "The law does not attempt to measure how little or how greatly the plaintiff may have fallen short of using ordinary care, but any failure in this respect, or slight want of such care contributing directly to the injury, will forbid a recovery."

Potter *v.* Railroad Co was again referred to in McCandless *v.* Railroad Co., 45 Wis. 366, accompanied by language unmistakably indicating a judicial view that wrongful conduct exceeding mere negligence in any of its degrees as ordinarily understood, that is, as characterized by inadvertence, is essential to prevent the defense of contributory negligence being effective. The position of the court as thus maintained can be most quickly and definitely stated by quoting from the opinion written by Mr. Justice Taylor, as follows: "This court has held that slight negligence or slight want of ordinary care on the part of the plaintiff, which contributed directly to the injury complained of, would defeat an action even when the negligence of the defendant was gross. Potter *v.* Railroad Co., 21 Wis. 372 (2); Cunningham *v.* Lyness, 22 Wis. 245. * * * There

1. Potter *v.* Chicago & N. W. R'y Co., 21 Wis. 372, 377, is reported in 7 Am. Neg. Cas. 157. See also former decision in 20 Wis. 533, 7 Am. Neg. Cas. 154.

2. Reported in 7 Am. Neg. Cas. 157.

was no evidence to go to the jury upon the question of whether the injury was produced by the wilful or malicious act of the servants of the defendant, and we think that nothing short of that would have justified a verdict in favor of the plaintiff."

The doctrine firmly established by the foregoing was so emphasized in Randall *v.* Telegraph Co., 54 Wis. 140, 11 N. W. Rep. 419, that no room was left to misunderstand the purport of our judicial history up to that time or opportunity for departing therefrom in the future, consistent with a familiarity with such history, without evincing an intention to adopt, to some degree at least, the doctrine of comparative negligence. In discussing instructions given by the trial court which followed the lines of the most extreme notions of comparative negligence, Mr. Justice Taylor, speaking for the court, said: "Such a rule of weighing comparative negligence of the parties has never been adopted in this state. The rule in this state is that slight want of ordinary care which contributes to the injury will defeat the plaintiff's action, no matter how gross the negligence on the part of the defendant, unless such negligence be so gross that the court and jury may infer that the act of the defendant was malicious," citing all the cases heretofore referred to, commencing with Potter *v.* Railroad Co. It is significant that some years later Mr. Justice Taylor, in Schilling *v.* Railway Co., 71 Wis. 255, 261, 37 N. W. Rep. 414, 40 N. W. Rep. 616, probably without intending to be inconsistent with the established doctrine of the court as by himself distinctly stated in the two opinions to which we have referred, dissented from the decision there rendered, upon the theory, as we read his opinion, of comparative negligence. He assumed that mere negligence of the defendant of a high degree — conduct short of such as imports an intention to injure — will preclude the successful interposition of the defense of contributory negligence. He referred to the conduct of the defendant as gross negligence sometimes, and as negligence at others, but there was no evidence in the case, as the court, we must assume, decided, indicating a wilful injury even to the extent of a conscious disregard of whether the injury which in fact took place was produced by his conduct.

In Schoenfeld *v.* Railway Co., 74 Wis. 433, 43 N. W. Rep. 162 (1), it is said that "the law has grown to be elementary that any negligence of the plaintiff, however slight, that contributed to the injury complained of, precludes his recovery." That was followed by

1. Schoenfeld *v.* Milwaukee City R'y Co., 74 Wis. 433, is reported in 10 Am. Neg. Cas. 530.

language for the first time, so far as we have discovered in any opinion of the court, giving color to the idea that gross negligence of the defendant, as the term is ordinarily understood, that is, having regard to the essential element of inadvertence, though of a high degree, will not shield the wrongdoer from the effects of his victim's contributory negligence. This is the language: "The learned counsel of the appellant contends that inasmuch as the defendant was guilty of gross negligence that caused the injury, the principle does not obtain. But neither the facts in evidence nor the finding of the jury made the defendant guilty of gross negligence. It was mere negligence and not wilful or gross that the jury found against the defendant. The authorities cited to this point are therefore inapplicable." When rightly understood it is clear that the word "gross" as there used referred to the wilful misconduct which was said in previous decisions to indicate intent. Mr. Justice Orton used the terms "wilful" and "gross" in close connection, the latter being really used as explanatory of the former. Of that there can be no doubt, since Potter *v.* Railroad Co., and the other cases to which we have referred, were cited with approval, where it was distinctly stated that gross negligence, using the term as indicating inadvertence, does not permit a recovery for an injury caused proximately thereby in the face of contributory negligence of the injured person contributing thereto.

Valin *v.* Railroad Co., 82 Wis. 1, 51 N. W. Rep. 1084, is recognized as out of harmony with previous decisions of this court. It was there said that negligence less than gross will permit a recovery even though the injured party be guilty of contributory negligence. The term "negligence," by itself, was evidently used as extending to the boundaries of inadvertence, and the term "gross," in connection with the term "negligence" as indicating wrongful conduct of a still higher degree. The departure which the opinion indicates from the law as previously declared was corrected in Lockwood *v.* Railway Co., 92 Wis. 97, 65 N. W. Rep. 866. Though it was there said, in effect, that contributory negligence of the plaintiff will not militate against his right to recover as against gross negligence of the defendant, it was plainly indicated that the latter term was used as descriptive of conduct evincing wilfulness, as the word is used in the law, as synonymous with intention, either premeditated or its equivalent, as regards legal liability for damages. The present Chief Justice there said, in effect, that inadvertence, in some degree, is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness and recklessness of a person as regards the personal safety of

another, has been designated by this court as gross negligence. The purpose of the opinion was to correct Valin *v.* Railroad Co., and to pronounce the law as in Potter *v.* Railroad Co., to which we have referred, such case being cited as the groundwork of the decision. The term "rashness, wantonness and recklessness" was used as synonymous with "wilful or malicious" in Randall *v.* Telegraph Co., and in McCandless *v.* Railroad Co., "wilfully, maliciously or intentionally" in Lynch *v.* Railroad Co., 84 Wis. 348, 54 N. W. Rep. 610, "wilful or gross" in Schoenfeld *v.* Railway Co., and similar expressions. It is perhaps unfortunate that so many different expressions have been indulged in to express the idea of wilful as regards the result caused — conduct indicating a sufficient degree of intent, at least, to be inconsistent with inadvertence, the distinguishing characteristic of negligence, strictly so called. The difficulty, if there be one, has grown out of extending the term "negligence" in connection with the term "gross" so as to cover wrongful conduct distinct from negligence, strictly so called, by including in it an element of advertence instead of inadvertence. "Wilful," in legal parlance, means intentional, though not necessarily that express intent characterized by premeditated design.

That the language in Lockwood *v.* Railway Co. was intended as indicated, is fairly demonstrated by the following, used by the same writer in Lynch *v.* Railroad Co., *supra*, in part heretofore referred to: "There is no sufficient evidence in the record to sustain the finding that the engineer was guilty of gross negligence. In fact the jury expressly exculpated him from wilfully, maliciously or intentionally injuring either of the horses." To the same effect is Schug *v* Railway Co., 102 Wis. 515, 6 Am. Neg. Rep. 239, 78 N. W. Rep. 1090, where it was said that gross negligence that cannot be defended against by contributory negligence is that rashness or wantonness which evinces a total disregard for the safety of persons or property and is but little less than intentional wrong. Also, White *v.* Railway Co., 102 Wis. 489, 496, 78 N. W. Rep. 585, where it was said that in all cases where the recovery is based on negligence the plaintiff's conduct must be free from contributory negligence however slight, if the defendant's negligence is short of that which may be justly called wilful. See also Duame *v.* Railway Co., 72 Wis. 523, 40 N. W. Rep 394; Pennsylvania Co. *v.* Sinclair, 62 Ind. 301.

There are other cases that might be referred to bearing on the subject discussed, but it is believed there are none that would furnish additional light or vary the conclusion to which those we have mentioned unerringly point. There has been substantial

harmony in the adjudications of this court from the first, leaving out Valin *v.* Railroad Co. and Little *v.* Railway Co., 88 Wis. 402, 60 N. W. Rep. 705. In the latter case there was a plain departure from the position of the court up to the time of the Valin Case, on the doctrine of comparative negligence. That occurred by following such case. With the exceptions noted such doctrine has not found any place in our jurisprudence, though in some jurisdictions it has become firmly intrenched; and in one, after becoming so intrenched, the mischief of it was avoided by a legislative return to sound principles. The first departure here was corrected in Lockwood *v.* Railway Co., as we have seen. The second departure was corrected in Johnson *v.* Railway Co., 91 Wis. 233, 64 N. W. Rep. 755.

Want of ordinary care upon the part of an injured person, however slight, precludes recovering compensation for his injury from another who contributed thereto by his negligence, however great, but not if so contributed to by wilful misconduct evincing intention to produce it, so far, at least, as to indicate conscious disregard of whether the injury occur or not, with knowledge that such a result will probably take place, which this court has brought under the head of the highest degree of negligence, calling it gross negligence. Circumstances rendering a claim for punitory damages, as against the immediate wrongdoer, are really necessary in order to render contributory negligence of the injured party immaterial.

In the light of the foregoing was contributory negligence material in this case? Counsel for both sides concede that such was not the situation unless the misconduct of the trainman was of that degree necessary to render the fact that the deceased was a wilful trespasser immaterial, that is, unless his conduct was such as to evince an intention to injure the deceased, or such an utter disregard of the consequences of his act as to indicate that willingness to injure him which is equivalent, in respect to legal damages, to intent to produce the result. That is unquestionably the law as it has been stated by this court, and most recently in Schug *v.* Railway Co., 102 Wis. 515, 6 Am. Neg. Rep. 239, 78 N. W. Rep. 1090. It is so laid down by standard text writers, as, for example: "If a railroad company wilfully injure a trespasser, it will be liable even though he may be guilty of contributory negligence. In some jurisdictions 'gross negligence' is used." Elliott, R. R., sec. 1254. "A railroad owes trespassers no contract duty. Indeed, as already stated, the general rule is that it owes them no duty except not to wilfully injure them; and this applies to those who are attempting to steal a ride or otherwise trespass upon the company's cars." Id., sec. 1255.

"A trespasser on a railroad train may recover for a wilful injury inflicted upon him by the trainmen in the performance of their master's duty." Suth. Dam. 64.

So it follows that whether the defense of contributory negligence and the finding of the jury in that regard were material, as well as the right of plaintiff to recover independent of it, turns on whether we can say that the trial court erred in holding that, looking at the evidence in the most favorable light for the plaintiff that reason will permit, and giving to him the benefit of the most favorable inferences it will reasonably bear, it does not indicate that the defendant's conductor was guilty of wilfully injuring the deceased. It seems that such question must be answered in the negative. There is no reasonable ground for saying that the conductor knew or ought to have known that a personal injury to the deceased would probably occur by his obeying the command to leave his position on the bumper of the car and cease his unlawful act of trespassing upon the defendant's property. The conductor supposed, and had a right to suppose, under the circumstances, that the deecased was a man of experience in jumping on and off trains when they were moving at a speed of more than four miles an hour; that he belonged to a class that were accustomed to such conduct, and without putting themselves in any serious danger of receiving personal injuries. The evidence is all one way to that effect. The train was going at no greater speed than a man can walk. It was still at the depot platform which the deceased left but a moment before he was injured to secure his place between the cars. He had the same means of safety leaving the train that he had in boarding it, save that it had in the meantime commenced to move slowly. Others of his class and with whom he had been associated were at that very time seeking to evade the vigilance of the trainmen and to board the train by seeking a position similar to that occupied by the deceased. He was not physically coerced. His ability, mentally and physically, to care for himself was not reasonably impaired by anything which the conductor did. The circumstances were very unlike those in Stone *v.* Railway Co., 88 Wis. 98, 59 N. W. Rep. 457 (1). That did not turn on the mere fact that the train was in motion, but the fact that it was going at a dangerous rate of speed, some eight miles an hour; and the further fact that the injured person was not a professional trespasser upon railway trains, but was one who appears to have boarded the train to ride as a passenger, supposing that he would be permitted to do so, and in that view

1. Stone *v.* Chicago, St. P., M. & O. R'y Co., 88 Wis. 98, is reported in 8 Am. Neg. Cas. 679 n.

took his place in the caboose. Nor is the case like Carter *v.* Railroad Co., 98 Ind. 552, where a trespasser was pushed off the front end of a switch engine while it was in rapid motion, and in such a way that he was unable to exercise judgment in making the movement, and was thereby caught under the wheels of the engine and seriously injured. Neither is it at all like Railroad Co. *v* Kelly, 36 Kan. 655, 14 Pac. Rep. 172, where the case turned on the dangerous rate of speed the train was moving, some eight miles an hour; that the injured person was a boy and that he was compelled to jump from the ladder of a box car in the face of apparent imminent danger of being thrown from his position. It is just as much unlike Ansteth *v.* Railway Co., 145 N. Y. 210, 39 N. E. Rep. 708 (1), where the injured person was a lad ten years of age and was so terrified that he dropped from a car upon which he was riding while in momentary loss of self-control. Such cases, and others upon which reliance is placed, are quite distinguishable, and have been distinguished in adjudications by other courts, from cases like this, two elements of distinction being referred to as of controlling significance: The speed of the train, and the inability of the injured party, by reason of the wrongful conduct of another, to use his judgment and control his movements. Mugford *v.* Railroad Co., 173 Mass. 10, 5 Am. Neg. Rep. 611, 52 N. E. Rep. 1078; Planz *v.* Railroad Co., 157 Mass. 377, 32 N. E. Rep. 356, 17 L. R. A. 835. Those cases are in harmony with the cases upon which counsel for appellant mainly rely, so far as the latter do not enter the domain of comparative negligence. They hold, and rightly, in our judgment, that there is no actionable wrong, if wrong at all, in insisting upon a person who is a wilful trespasser upon a railway train ceasing his unlawful conduct instantly, if the train be not going at such a rate of speed as to render that unreasonably dangerous under the circumstances and the trespasser be not ill-used so as to cause him to momentarily lose his judgment or self-control. We perceive no difficulty in the rule of the Massachusetts cases when rightly understood. The Massachusetts court holds as strongly as any other that a trainman cannot, in the pursuit of his master's business, wilfully injure a trespasser on his train without the master thereby becoming liable for the resulting damages, but that he may properly command such a wrongdoer to end the trespass at any time, not accompanying such command by conduct indicating such imminent danger of its being so enforced as to produce involuntary compliance therewith. If the command be obeyed and an injury

1. Ansteth *v.* Buffalo R'y Co., 145 N. Y. 210, is reported in 8 Am. Neg. Cas. 555 n.

to the trespasser result, the previous command will not evidence a wilful injury even if the speed of the train be such that to physically compel the trespasser to cease his unlawful conduct would render a resulting injury wilful and actionable. The doctrine seems sound, and it applies to this case so far as it fits the facts. The respondent's conductor commanded the deceased to leave the train. He did not touch the deceased nor threaten violence to him, nor do anything reasonably indicating that he was about to physically compel deceased to cease the trespass and to accept imminent danger of receiving a personal injury in doing so.

It must be admitted that Johnson *v.* Railroad Co. (C. C.), 94 Fed. Rep. 473, goes much further than the doctrine referred to. We do not deem it necessary to even discuss in this case the extreme views which United States District Judge Shiras there expressed. The doctrine that human life cannot wilfully be seriously imperiled to prevent or end a mere trespass upon property must not be invaded by courts even to remedy the menace and almost intolerable mischief caused by the conduct of those who habitually unlawfully contend with railroad trainmen to secure transportation upon their trains. But the inviolability of personal security against wilful injuries can be adequately secured without going to such an unreasonable length as to hold that a railway company cannot rid its trains of the presence of wilful trespassers without first stopping such trains. That would, in effect, deny such company the right to protect its trains at all against such lawlessness, as in that case such an army of men would be required to effect that result as to render the conduct of railway business impracticable.

Our statute (sec. 1818, Rev. St. 1898) requiring a train upon which a passenger is riding after having refused to pay his fare, to be stopped at a railway station or near a dwelling house before putting him off does not apply to such a case as this.

This opinion would need to be extended to a great length in order to review even a major part of the numerous cases cited by the learned counsel for appellant. While we cannot agree with his conclusions, we are much indebted to his industry and ability in reaching a right one.

A railway company may lawfully require a wilful trespasser upon one of its moving trains to immediately cease his unlawful conduct, by such means as not to indicate a willingness to deprive him of his self-control in leaving the train, the speed of such train not being so great that a personal injury to him should be expected to occur, giving due consideration to the duty of the trespasser to cease his lawlessness by all reasonable means in his power and reasonable

expectation that he will use such means in attempting to do it. It is not sufficient to indicate an intentional injury that the party causing it had reasonable ground to expect that such a result was within reasonable probabilities, otherwise a violation of the duty to exercise ordinary care would, of itself, be sufficient to indicate such an injury. The danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of a belief that such other either contemplated producing it, or that, being conscious of the danger that it would occur, imposed that danger upon such person in utter disregard of the consequences, to warrant saying, reasonably, that the circumstances indicate wilfulness to perpetrate such injury. Railway Co. *v.* Miller, 149 Ind. 490, 49 N. E. Rep. 445.

The judgment of the Circuit Court is affirmed.

VOLK v. B. F. STURTEVANT COMPANY.

United States Circuit Court of Appeals, First Circuit, October, 1900.

EMPLOYEE STRUCK BY ELEVATOR WHILE WORKING IN ELEVATOR WELL — RISK OF EMPLOYMENT. — Where plaintiff, an employee of defendant, was injured by an elevator striking him while he was at work in the elevator well, and it appeared that he had been in the defendant's employ as a sweeper and cleaner more than two years prior to his injury, that it was part of his duty to clean out the space underneath the elevator car at the place where he was injured and that the operation of the car at the time of injury was the same as it had been during the time of his employment as cleaner and sweeper, and the danger was obvious, it was held that plaintiff assumed the risk of his employment (1).

IN ERROR to the Circuit Court of the United States for the district of Massachusetts. *Judgment affirmed.*

For former opinion, see 39 C. C. A. 646, 99 Fed. Rep. 532.

EDWARD H. SAVARY, for plaintiff in error.

WALTER B. FARR and M. F. DICKINSON, JR., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. — This is a suit at common law, wherein the Circuit Court directed a verdict for the defendant, and the

1. For other actions relating to Elevator Accidents, from 1897 to date, see vols 1-9 AM. NEG. REP., and the current numbers of that series of REPORTS. See also note on ELEVATOR ACCIDENTS, in 8 AM. NEG. REP. 146-157.

plaintiff thereupon sued out this writ of error. The suit was commenced by Lawrence Esch, who afterwards deceased, and the present plaintiff intervened as administratrix of his estate. The first count in the declaration, omitting the allegations of the details of the injuries done, reads as follows:

"And the plaintiff says that on December 5, 1898, he was in the employ of the defendant as a workman, and, in the regular line of his duty, was in the bottom of an elevator well, and cleaning it out, at the works of the defendant, situated in that part of Boston, in said district, called 'Jamaica Plain;' that it was the duty of the defendant to reasonably protect him in his work; that the defendant failed in this duty, in that at said time and place it negligently failed to reasonably provide that he should be protected from the elevator car, which ran in said elevator well, coming down upon him when he was rightfully at the bottom of said elevator well, and injuring him, in consequence of which the said elevator car did come down upon him at said time and place, while in the exercise of due care, and he was shocked, bruised, hurt, and injured thereby."

There are other counts, but they only state the same cause of action in somewhat different phases; and, in view of the conclusions which we have reached, the first sufficiently states the plaintiff's contention, and describes the utmost that she can claim with reference to the matters of fact to be deduced from the proofs in the case. It appears that Esch had been in the employment of the defendant as a sweeper and cleaner about two years and a half prior to his injury, and that it was a part of his duty to clean out several times a week underneath the elevator car at the place where he was injured. The proofs show no condition of affairs leading up to his injury which was not within the observation and apprehension of any man of ordinary understanding. It also appears that the elevator car and its appurtenances, and the manner in which it was operated, were, at the time he was injured, in all respects the same as they had been during the time that Esch had been employed as sweeper and cleaner, and that there were no circumstances which prevented Esch from fully observing the conditions as they existed at the time of the injury, and had existed. Therefore the case comes plainly within the rules with reference to the assumption of risks by employees, of which a late statement is in Railway Co. *v.* Archibald, 170 U. S. 665, 672, 673, 18 Sup. Ct. Rep. 777, 42 L. Ed. 1188.

The plaintiff in error undertakes to except this case from the general rules on the alleged grounds that this was not a risk of the kind which the servant assumes, because it was one from which

Esch could not have protected himself, and the master might have guarded him, while it is only those risks which can be obviated by a reasonable measure of precaution which are assumed. The facts of the case do not support a claim that it was impossible for Esch to have protected himself. The rules as to the assumption of risks by employees have been several times quite fully stated by the Supreme Court, — with the rest, in Tuttle *v.* Railway Co., 122 U. S. 189, 195, 7 Sup. Ct. Rep. 1166, 30 L. Ed. 1114; Railroad Co. *v.* McDade, 135 U. S. 554, 570, 10 Sup. Ct. Rep. 1044, 34 L. Ed. 235; and Railway Co. *v.* Archibald, already referred to, — and, while there are admitted exceptions to those rules, the Supreme Court has recognized none as claimed by the plaintiff in error. Indeed, in many cases on this topic passed on by that court, in which the defense of assumption of risks by the employee was maintained, the circumstances were such as to have required extreme care on the part of the employee. In this particular the plaintiff relies on Smith *v.* Baker [1891], App. Cas. 325 (1); but in McPeck *v.* Railroad Co., 25 C. C. A. 110, 79 Fed. Rep. 590, 595, we held that the rule of that case is certainly not that of the federal courts. We may also add that in McPeck *v.* Railroad Co. the employee of the defendant was working on the defendant's track, and was injured by a passenger train that was late. The circumstances of that case, and the principles applicable to them, defeat the plaintiff in error, although it was not there necessary that they should be fully stated.

The plaintiff in error also relies on an exception to the refusal of the Circuit Court to admit evidence in her behalf to the effect that a swinging guard or fence might have been used, of a character which would have protected Esch from liability to injury; but the witness had already testified that such a guard was not in use in outside elevators, to which class the elevator here in question belonged, thus bringing the evidence offered within our observations made with regard to Mather *v.* Rillston, 156 U. S. 391, 399, 15 Sup. Ct. Rep. 464, 39 L. Ed. 464, in Whitney *v.* Railroad Co. (C. C. A.), 102 Fed. Rep. 850. However, we need not consider this further;

1. In Smith *v.* Baker (H. L. 1891), App. Cas. 325, 60 L. J. Q. B. 683, 65 L. T. 467, it appears to have been held that knowledge by the servant of the risk of danger is not a conclusive limit of the master's liability. The contrast between knowledge and consent is illustrated in that case by such examples as the danger undertaken by a sailor in mounting the rigging of a vessel, or by a workman engaged in employment injurious to health, and cases where a workman does not press complaint for fear of dismissal from employment.

because the evidence, if admitted, would not have availed the plaintiff in error, under the rules which we have cited relating to the assumption of risks by employees.

The judgment of the Circuit Court is affirmed.

HARDER & HAFER COAL MINING COMPANY OF SULLIVAN COUNTY, INDIANA v. SCHMIDT.

United States Circuit Court of Appeals, Seventh Circuit, October, 1900.

DANGEROUS PREMISES — NOTICE — FAILURE TO REMEDY. — Where an employee in a coal mine called the attention of the mining boss to the dangerous condition of the roof, but was assured by the boss that there was no danger, the master could not claim exemption from liability for injuries on the ground that the danger was obvious, where the employee was dissuaded of his apprehension of danger by the mining boss (1).

EMPLOYEE INJURED IN COAL MINE — MASTER LIABLE. — Where a coal miner was permitted by a mining boss, such permission being either express or implied, to go to a certain place in the mine, and there received injuries from causes of which he had no previous knowledge, but which were known to the master and should in compliance with his duty to provide a safe place to work in, have been obviated, the injured party may recover from the master (2).

IN ERROR to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. *Judgment affirmed.*

The defendant in error was the plaintiff in the court below, and obtained a verdict and judgment against the plaintiff in error, defendant below, in the sum of two thousand eight hundred and ninety-five dollars damages for personal injuries received by the defendant in error in the mines of the plaintiff in error. The principal error relied upon is that the court refused, at the conclusion of the testimony, on motion of the plaintiff in error, to instruct the jury to find a verdict for the plaintiff in error.

The evidence was somewhat contradictory, but the facts found

1. For other actions relating to Master and Servant and the question of Assumption of Risk, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See also note on ASSUMPTION OF RISK, in 7 AM. NEG. REP. 97–111.

2. For other actions relating to Liability of Master for Injuries to Servant, caused by failure to furnish safe appliances and places of work, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

by the verdict of the jury, upon the instructions given, and supported by a sufficient weight of evidence, may be stated as follows:

The plaintiff in error was, on the 20th of December, 1894, a corporation under the laws of Indiana, conducting a coal mining business in Sullivan county in that State.

The general plan of the mines, so far as it need be considered, is, in substance: A long horizontal passageway called the "main entry" runs north and south past the foot of the hoisting shaft. This passageway is used for drawing cars of coal to the shaft. Other similar passageways used for the same purpose are cut at right angles to the main entry or passageway, and they also run in a horizontal direction, and the coal cars are drawn in them from the "rooms" where the miners excavate the coal, over to the main entry, where they turn and traverse the main entry to the hoisting shaft. These latter passageways, which run east and west, or at right angles to the main passageway or entry, are high enough for a man to walk in and wide enough for cars to be pulled through, averaging from six to nine feet in width.

From these east and west passageways the miners bore into the coal veins at regular intervals or distances along the passageway, and make what are called "rooms." The room is made by excavating or removing the coal, and it is in these rooms that the actual mining work of dislodging coal is performed. Before the room is made, there is a piece of technical work performed called "turning the room," which means making a doorway from the passage into the room. This is done by picking or blasting a hole about four feet wide and four feet high into the side of the passageway, a distance of about six feet. When the miner clears out such a hole he may then remove the coal lying beyond and open up the area called the "room."

Sections 7472 and 7479 of the Mining Act of Indiana (Burns' Rev. St. 1894) are as follows:

"7472. Duties of Bosses. — That the mining boss shall visit and examine every working place in the mine at least every alternate day while the miners of such place are, or should be at work, and shall examine and see that each and every working place is properly secured by props or timber, and that safety in all respects is assured, and, when found unsafe, he shall order and direct that no person shall be permitted in an unsafe place, unless it be for the purpose of making it safe. He shall see that a sufficient supply of props, caps and timber are always on hand at the miners' working places. He shall see, also, that all loose coal, slate and rock overhead

wherein miners have to travel to and from their work are carefully secured.

"7479. Mining Boss — Duties. — That in order to secure the proper ventilation of each coal mine, and promote the health and safety of the persons employed therein, the owner, operator, agent or lessee shall employ a competent mining boss, who shall be an experienced coal miner and shall keep a careful watch over the ventilating apparatus and the air ways, and shall see that, as the miners advance their excavations, all loose coal, slate and rock overhead are carefully secured against falling therein on the traveling and airways. He shall measure the air current at least once a week at the inlet and outlet, and at or near the face of the entries; he shall keep a record of such measurements which shall be entered in a book kept for that purpose, the said book to be open for the inspection of the mine inspector. He shall, also, on or about the first day of each month, mail to the inspector a true copy of the air measurements given, stating, also the number of persons employed in or about said mine, the number of mules and horses used and the number of days worked in each month. Blanks for this purpose shall be furnished by the state to the inspector and by the inspector to each mine boss."

In the operation of these mines the miners were paid sixty cents a ton for the coal mined and loaded, and two dollars for turning the room. In a general way, a miner, with his help or buddy, worked a room, each other miner, with his help or buddy, working some other room; but occasionally a miner had more than one helper, especially when he wished to help one who was waiting for a place as an employee.

The plaintiff, Herman Schmidt, was a practical coal miner of about twenty-four years' experience, but had been employed in the defendant's mine for about two weeks. With his buddy he was engaged in mining coal from one of the rooms.

On the day when the accident occurred the mine was shut down to such an extent that there could be no service of the coal cars. At the breakfast table that morning Schmidt was told by another miner, Ferdinand Yochem, that Yochem was about to start a new room about a thousand feet distant from the room assigned to Schmidt, and that if Schmidt and his buddy would help in turning this new room, the two dollars would be divided between them. To this Schmidt agreed. They went separately to the mine, the superintendent having been told by Schmidt that he was going to his room to finish picking up some loose coal, so that the room would be ready for the cars when they started again; and having been

told by Yochem that he was going to the place assigned for the turning of the new room.

There was some dispute on the trial whether the superintendent had been told by Yochem that Schmidt would assist him in the turning of the room. The testimony of Yochem on that subject was as follows:

"Q. Did or did you not have any conversation with the superintendent about whom you should have to help you?" "A. Well, I said to Lawrence [the superintendent] I take Fenger [Yochem's buddy] with me to this place and he said all right."

"Q. You said nothing about Schmidt? Did you say anything to him about Schmidt or Neuroth?" "A. Yes, I told him in the morning I go down, I said to Schmidt and Neuroth you got lots of coal, you come down and help me in my place, and he said all right, I have nothing against it."

"Q. When you were talking with the superintendent was Schmidt there?" "A. No, sir, Schmidt he was away before me at the boarding house."

The instructions given to the jury by the court upon this point were as follows:

"If you believe from the evidence that the plaintiff was engaged by the defendant to work in its mine in a certain room, and that the duties of the plaintiff did not call him to assist Yochem and Fenger, then the court instructs the jury that, unless they further believe from the evidence that plaintiff was authorized or permitted by the defendant or some servant of the defendant's in charge and authority over the plaintiff to go to the place where he was injured, and that the condition of such place was unknown to the plaintiff, then the jury should find the defendant not guilty."

"The court instructs the jury that if you believe from the evidence, that Herman Schmidt went to the place where Yochem and Fenger were at work, to aid them in firing the shot, without any instruction or authority or permission, expressed or implied, from the defendant or its duly authorized agent, to go there, and was injured by reason of his going there to assist in firing such shot, or to see that the same was afterwards properly fired, then the court instructs you as a matter of law, to find the defendant not guilty."

There was no timbering or other protection to the passageway of the mine, and none at the place where the new room was to be turned. Immediately above this point was a fissure or seam in the ceiling of the passageway of such a nature that a portion of the rock in the seam was supported by the piece of the wall which was to be blasted away to make the doorway. The danger imminent from

this fissure could have been avoided by the putting in of appropriate timbers. Yochem and the mine boss talked of this rock the day before, Yochem saying that the place "looked no good," but the mine boss saying that it could not fall down; that it was solid rock. Schmidt's attention, so far as the evidence goes, was not called to this fissure.

After doing a little work, on the morning of the injury, in his own room, Schmidt and his buddy went to the place where Yochem proposed to turn the new room. The blast was set, and Yochem and Schmidt, with their buddies, withdrew until it was fired off. Shortly afterwards they returned, Schmidt being in advance, when the rock overhanging the seam fell, and caused the injuries for which the action was brought. Had the gangway at this place been properly timbered, the rock would not have fallen.

Some of the counts of the declaration proceed upon the common-law obligation of the mining company to furnish a safe place in which the employees may work, and some of them upon the special statutes hereinbefore set out.

The bill of exceptions does not show that any exceptions were taken, after instructions, before the withdrawal of the jury, and the brief filed by the plaintiff in error does not set out specifically any instructions given, or instructions refused, or any evidence admitted, or evidence ruled out, upon which error is predicated.

O. W. DYNES, for plaintiff in error.

CYRUS J. WOOD, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

GROSSCUP, Circuit Judge (after stating the facts), delivered the opinion of the court, as follows:

Indisputably the plaintiff in error was bound by law to furnish to its employees safe gangways and working places. The statutes of Indiana are, in this respect, only supplemental to the common-law obligations. If, as the jury found, the plaintiff in error failed in the performance of this duty, causing the injury for which the action is brought, the action is maintainable, unless Schmidt was there without invitation, or had notice of the dangerous character of the place. The two inquiries thus suggested constitute the fighting ground of this case.

The evidence discloses that the imminence and nature of the danger was called to the attention of the mining boss by Yochem; that Yochem was assured that his apprehensions were unfounded; and that Schmidt had no knowledge of their existence. Whatever may be the exemption of the employer from liability for injuries

caused by a danger that is obvious to the injured, such exemption will not be accorded where the nature of the menace is so uncertain as to cause discussion between the employees and the employer, with the result that the employer dissuades the employee of his apprehension; and especially so where the particular employee injured is without any knowledge of its existence. This disposes of the question of contributory negligence, and of any question growing out of the assumption of risk by the defendant in error.

It is not necessary, in this case, to determine, as a matter of law, growing out of his general employment, whether Schmidt was, at the place and time of the injury, within the protection of the general rule imposed upon employers to provide a safe place for their employees. The jury found, as a matter of fact, that Schmidt was present by the permission, either express or implied, of the superintendent. The evidence was somewhat uncertain whether the superintendent told Yochem, on the morning in question, that Schmidt might assist him. Yochem was an illiterate witness, and his answer might be interpreted to mean, either that he had told Schmidt to help him, and Schmidt said it was all right; or that he had told the superintendent that he had so told Schmidt, and the superintendent had said it was all right. But there is testimony of no uncertain kind that Yochem was permitted more than one helper, and, therefore, Schmidt was present, on the morning in question, under this general permission. The instructions of the court upon these issues were certainly as favorable as the plaintiff in error could demand, and we can see no reason why the verdict of the jury should not now be controlling. The case made out, then, is that of an employee, permitted by the employer to go to a certain place in the mines, and there receiving injuries from causes of which he had no previous knowledge, but which were known to the employer, and which should, in compliance with its duty to provide a safe place to work in, have been obviated. Such a case is, of course, maintainable.

The judgment will be affirmed.

BOSQUI v. SUTRO RAILROAD COMPANY ET AL.

Supreme Court, California, January, 1901.

PASSENGER INJURED BY DERAILMENT OF STREET CAR AND COLLISION WITH ANOTHER CAR — EVIDENCE. — In an action to recover damages for injuries sustained by a passenger, caused by one of defendant's cars leaving the rails and colliding with another car coming from an opposite direction, the question whether the testimony of experienced railroad men, on the point as to the rate of speed at which the car was going, is entitled to more weight than that of ordinary railroad passengers, the latter's testimony being unchallenged, is for the jury, and there being sufficient evidence to support the jury's finding on the passenger's testimony, the verdict will not be disturbed (1).

EQUIPMENT OF ROAD — SPEED OF CAR — EVIDENCE. — In such action it was proper to exclude testimony offered by defendant to show how the equipment of its electric road compared with that of other roads, both electric and cable, where the purpose of such testimony was to show that cars could be run over the track thirty miles an hour with safety.

RATE OF SPEED — EVIDENCE — HARMLESS ERROR. — It was harmless error to exclude defendant's testimony as to what rate of speed such cars could be run with absolute safety, so far as derailment was concerned, where defendant's witness was permitted to testify that the car in question could be run over defendant's road at a speed of thirty miles an hour, without derailment.

INSTRUCTION — STANDARD OF CARE. — An instruction defining the standard of care to be used by the motorman to be that of a "very cautious man standing in his shoes, and compelled to exercise care * * * in the same situation, and surrounded by the same circumstances," is not open to the objection that it exacts "double distilled care" of a common carrier.

INSTRUCTION — PRESUMPTION OF NEGLIGENCE — CARRIERS. — The charge that "the proof of the occurrence of the accident without fault of the passenger is *prima facie* proof of negligence on the part of the company," was correctly given, the rule being applicable to street railways, especially where operated by electricity or steam power.

COMMISSIONER'S DECISION. Department 2. Appeal from Superior Court, City and County of San Francisco; William R. Daingerfield, Judge.

1. For actions arising out of Derailment of Street Cars, Trains, etc., from the earliest period to 1897, see vols. 9 and 10 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic to date, are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

For actions arising out of Collisions Between Street Cars, Trains, etc., from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

Action by Benjamin A. Bosqui against the Sutro Railroad Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. *Judgment affirmed.*

SMITH & MURASKY and MCKINSTRY, BRADLEY & MCKINSTRY, for appellants.

C. H. WILSON, for respondent.

CHIPMAN, C. — Action for personal injury. The trial was by a jury, and plaintiff had the verdict. Defendant appeals from the judgment and from an order denying its motion for a new trial. The injury was caused by one of defendant's cars leaving the rails and colliding with another of its cars coming from an opposite direction.

1. It is contended by defendant that the evidence is insufficient to justify the verdict. Counsel argues the point upon the assumption either, 1, that the judgment can be sustained only on the theory that defendant failed to overcome the presumption of negligence arising from proof of the accident; or, 2, that evidence "real and substantial" (Driscoll *v.* Railway Co., 97 Cal. 553, 32 Pac. Rep. 591) was offered by plaintiff that the car was derailed because of its excessive speed; and defendant's counsel assume that plaintiff will not contend that the negligence of defendant was affirmatively shown in any way other than by proof as to the speed of the car. Plaintiff, however, contends, not only, 1, that the car was being run at an excessive speed; but, 2, that, with even ordinary care, the car could have been stopped after it left the rails, and before the collision; 3, that the incoming car should have been stopped before it collided with the car on which plaintiff was a passenger; 4, that the car was not derailed by gravel previously piled on the rails, as contended by defendant, but that any gravel found on them after the collision was thrown there by the car itself while running along the side of the rails; and, 5, if it be true that some person, unknown to defendant, placed the obstruction on the tracks, still defendant was guilty of negligence in not stopping the car before the collision.

Defendant operates an electric street-railway line from the west terminus of the Sutter street-car line to the Cliff House. Defendant's outgoing car 37 left its starting point going to the Cliff House at 8:35 o'clock P. M., April 9, 1897. On Richmond avenue, just beyond the crossing of Commonwealth avenue, and on a straight track, car 37 left the rails, and continued moving for a distance, variously stated as 70 to 100 feet, when it collided with defendant's incoming car 29. Plaintiff was riding on car 37, which was crowded with passengers, and received the injury complained of by reason of the collision. No question of plaintiff's contributory

negligence arises, and the evidence is undisputed that the track was well constructed, and the appliances for operating the car in perfect order, and suitable for the purposes for which they were being used.

Upon the question of the speed of car 37 when it left the rails, it is conceded by defendant that the evidence is conflicting, — plaintiff's witnesses testifying to a speed of fifteen to twenty-five miles an hour, and defendant's witnesses to a speed less than eight miles an hour (the motorman put it at seven miles), — but defendant claims that, its witnesses being experienced railroad men, "such testimony is entitled to more weight than that of ordinary railroad passengers." This view of the evidence seems not unreasonable, and, if the fact could be said to be one peculiarly within the knowledge of railroad men, should have had weight with the jury; but we cannot say, as matter of law, that the jury should have disregarded the one and accepted the other class of evidence. Defendant cites the case of Railroad Co. *v.* Huntley, 38 Mich. 540 (1), where it was held that "opinions of persons riding in cars, and not observing from the outside, should be excluded, unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable." We cannot agree with this statement, but, even if sound law, no objection was made to the testimony of plaintiff's witnesses upon this or any other ground. Their testimony went to the jury unchallenged. The question whether defendant's witnesses were more competent to testify to the point in issue than plaintiff's witnesses, and the reason for giving the greater credence to the opinions of defendant's witnesses, were considerations properly addressed to the jury, and with their conclusion, there being sufficient evidence to support it, we cannot interfere. But the unusual, if not a dangerous, speed of a street car on a straight track, unaccompanied by any other circumstance, is not negligence, and the court substantially so charged the jury. It was urged at the trial and is urged here that the evidence showed that gravel or loose macadam with which the street was paved had been piled on the rails by some person or persons unknown to defendant, and that the car was thrown from the track by this loose material, upon which the car came so suddenly that it was impossible for the motorman to check the speed, and prevent the car from running onto the obstruction. Plaintiff contended, and now urges, that the track was clear, and that this loose material, afterwards found packed upon the rails, was thrown there by the forward truck

1. Grand Rapids & Ind. R. R. Co. *v.* Huntley, 38 Mich. 537, 540, is reported in 9 Am. Neg. Cas. 472.

wheels as they passed along near the rails in the loose macadam, before swerving to the left towards the incoming car, and was run over by the rear truck wheels while still on the track, thus accounting for the crushed appearance of gravel on the rails after the accident. The motorman testified that he saw the obstruction when within ten feet of it, and immediately set his brake; that the car ran over about six feet of the gravel on the track, and then left it, and collided with car 29 at a point about seventy feet distant; and that car 37 was running about seven miles an hour when it struck the gravel. No other person saw any obstruction on the rails before the car went off, and there was evidence from which an inference might have been drawn that the gravel on the rails was pushed onto them by the car wheels after it left the rails. The motorman of car 29 testified that he saw car 37 jump the track when four lengths from his car, and he was traveling about seven miles an hour up grade. The evidence was that both cars were so injured as to show that they came together with considerable force, so that, as testified by defendant's superintendent, "the front of car 37 was broken in, the glass broken and the steps wrenched and broken, and the front poles or stanchions broken. The kingbolt was also bent. Car 29 was damaged in a similar manner."

These stanchions were $3\frac{1}{4}$x$2\frac{1}{4}$ inches dimensions, and by the concussion passengers in both cars were unseated, and several of them thrown off the cars. An experienced engineer, a builder and operator of electric roads, Mr. Leland, testified that a car weighing twelve tons, thirty-five feet long (these weighed twelve tons and were thirty-seven feet long), proceeding down a $5\frac{8}{10}$ per cent. grade (the grade at the point in question), at the speed of twenty-five miles an hour, could be stopped in fifty feet; at twenty miles an hour, in about forty-two feet; at seven or eight miles an hour, in less than its own length. He further testified: "In cases of emergency, electric cars are stopped by throwing in the reverse current. It is called slugging the motors, and it causes the motors to act as generators of electricity, which causes the car first to stop, and then go backwards. It is a very simple operation, and, if the car at the time of the accident was proceeding motor off (as the motorman testified was the fact), could have been applied instantly. I have never known it to fail, and it should always be resorted to in cases of great peril or imminent danger. It stops the car very quickly." It is not pretended that defendant's motorman resorted to this expedient, or did more than apply the brake, which he testified, from what he said he afterwards learned, did not have any effect after the car left the track. It is quite probable that the motorman of car

29, coming up this grade, could have stopped his car in time to have avoided the collision, if Mr. Leland's testimony is to be believed, and it be true that car 37 was going no faster than seven miles an hour when it left the track. He saw car 37 coming towards him, and off the track, 148 feet, or four car lengths, away, and at the speed he was traveling he could have stopped his car in less than its own length, and, whether car 37 went seventy feet or 100 feet, after it left the track, the two would not have come together. Motorman Knox, of car 29, also testified that he set his brakes and reversed his motors, and was "nearly stopped" when the collision happened. He testified further: "The other that was approaching me was not going over seven miles an hour, and much less, I think, at the time it hit my car." Mr. Knox does not state how far his car traveled after he applied the brakes and reversed the motor, but it could not have been over thirty-five feet, according to Mr. Leland's testimony. This would show that car 37, after the brake was applied, while the car was on the track, and with the brake on afterwards, to more or less purpose, ran, with its trucks in loose macadam, over 100 feet, and was, when it collided with car 29, still going at considerable speed, judging from the effect upon the two cars. The inference drawn by the jury from this evidence must have been that when car 37 jumped the track it was going at a high rate of speed, as plaintiff's witnesses testified, and faster than the usual speed of defendant's cars, and much faster than the statutory limit of eight miles an hour; and that, even though the car was derailed by means of the obstruction, the collision would not have occurred but for the excessive speed of car 37 at the time it left the track. Then, too, the jury may have believed Mr. Leland in stating that car 37 could have been stopped by the slugging process he described, but which the motorman failed to apply or account for not applying. The jury may also have believed from the testimony that Motorman Knox, of car 29, was negligent in not stopping his car in time to avoid the accident. It was certainly his duty to do so if reasonably within his power, and defendant would be equally liable for failure of duty on his part as for failure of duty on the part of Motorman Rogers, of car 37. The evidence was conflicting upon all these hypotheses, and, while we might differ with the jury as to where the preponderance of the evidence lay as to one or more of the theories upon which the jury must have determined the case, we are not at liberty to interpose our judgment for that of the jury where, as we think was true, there was some real and substantial evidence to support the verdict.

Defendant's counsel correctly state the general rule that the

breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to plaintiff; and as stated by Shear. & R. Neg., sec. 26: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." This rule is sought to be applied on the assumption that the evidence shows beyond question that the proximate and only cause of the collision in the present case was due to the obstruction on the railway track. But the evidence is not all one way as to the fact, and, besides, it does not follow that the car would have left the track at all if the speed had been seven or eight miles an hour instead of more than twice that speed, as the jury were warranted from the evidence in believing it to have been. Furthermore, defendant's counsel ignore the evidence of a new cause for the collision arising after the car left the track. The nature of this evidence has already been suggested. For example, the excessive speed of car 37 may not only have caused it to leave the track when, at the usual speed, it would have safely passed over the gravel on the track (assuming that gravel was previously placed there), but, had the speed been seven miles an hour instead of fifteen or twenty, the car would in all probability not have run eighty or 100 feet through the loose macadam, or, having done so, the two cars would have come together with little or no force.

2. Error is claimed in sustaining plaintiff's objection to the following question put to defendant's witness, Superintendent Van Frank: "How did these rails used on this electric road compare with the rails used on other roads in town, both electric and cable." In sustaining the objection, the court said: "You can go into probative matters as to how this road is built, if you want to show it is a safely built road and safely equipped." Counsel stated that their purpose was to show that on a road such as this, and with such cars as were there used, the cars could run over the track thirty miles an hour with safety. The court remarked: "I don't say you cannot prove that, but I don't think you can prove it in that way. You ask the witness now to compare the equipments of this road with equipments of other roads." We think the ruling was correct, and, besides, the record shows that counsel got what they wanted from the witness later on.

3. The same witness was asked the following question: "Now, at what rate of speed could those cars be run, if it were so desired, with absolute safety, so far as derailment was concerned?" The court sustained plaintiff's objection, and the ruling is claimed to be

error. The court remarked that the objection was to the form only, and that counsel were entitled to some of the points suggested by the question, and counsel did immediately ask the witness whether a car such as No. 37 "could not be run over that road on a straightaway, barring curves, at a speed of thirty miles an hour, without derailment," and the witness answered that it could. Conceding error in the ruling, it was without injury.

4. Defendant asked certain instructions, marked "2" and "3," which the court gave, with modifications. The refusal to give the instructions as asked, and in giving them as modified, is assigned as error. The instructions involved were intended to guide the jury with reference to the duty of the motorman, and especially as to the degree of care required of him when suddenly confronted with an obstruction on the track whose presence there he could not reasonably have anticipated or foreseen. Defendant asked that the jury be told that defendant would not be liable if the motorman exercised such care as "would have governed an ordinarily prudent man in the same circumstances," etc. Again: That "the standard of care to be used by motormen * * * must be measured by the foresight and caution of the average prudent man standing in their shoes, and compelled to exercise care * * * in the same situation and surrounded by the same circumstances." The court defined the standard of care to be used by the motorman to be that of a "very cautious man standing in his shoes, and compelled to exercise care * * * in the same situation, and surrounded by the same circumstances." Again the court said: "If he acted in the premises with the same care as would be exercised under the same circumstances by an extremely cautious person," etc. It is conceded by defendant's counsel that carriers of passengers must exercise "great care, or the utmost care, or even the care of very cautious persons," and that an instruction so stating would not have been erroneous "without the additional reference to surrounding circumstances;" but it is urged that as given the instruction "exacts double-distilled care of the defendant common carrier." The objection is stated in another form as follows: "The reasonable and prudent man, in view of the circumstances which surrounded Rogers, the motorman of car 37, would exercise the utmost care, and this is all that can be reasonably exacted of the common carrier. The extremely cautious person, under such circumstances, would exercise extraordinary care, which the law does not require of a common carrier." And it is urged that "the effect of such a rule would be to make common carriers insurers of their passengers, since a jury might always find

an accident could have been avoided if the motorman * * * had exercised, under all the circumstances of the case, * * * such care as a 'very cautious man,' or an 'extremely cautious person,' would have exercised." It is further urged that it was for the jury, and not for the court, to say whether a failure to employ extremely cautious men is a breach of the carrier's obligation to exercise the utmost care. It was said in Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. Rep. 266, after citing certain cases decided by this court: "It thus appears to be settled law in this State that a proprietor of stagecoaches is liable for the slightest negligence in regard to the vehicle provided by him; that he is responsible to his passenger for the utmost care and diligence of extremely cautious persons." In speaking of the rule as applied to railroad companies, the court said: "The railroad company is bound for the utmost care and diligence of very cautious persons, and is responsible for any, even the slightest, neglect." Many cases are cited approvingly where such expressions are used as "extreme vigilance," "as far as human care and foresight can go," "greatest possible care," "is liable for the smallest negligence," "highest degree of care," and the like, as indicating the degree of care required. In McCurrie *v.* Southern Pac. Co., 122 Cal. 558, 55 Pac. Rep. 324, the rule as to railroads was stated as follows: "The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them, while in the course of transportation, which might have been avoided by the exercise of such care." We cannot see that the instructions complained of intensified the rule by the use of any unwarranted adjectives. The use of the terms "very cautious person" and "extremely cautious person" finds ample justification in adjudicated cases of recognized authority, and the qualifying words, "under the same circumstances," seem to us rather favorable to defendant than otherwise, and, indeed, were used in the instruction asked by it. Negligence always is relative to the circumstances surrounding the case. Franklin *v.* Road Co., 85 Cal. 63, 24 Pac. Rep. 723 (1).

It was for the court to instruct the jury as to what constitutes negligence, and hence it was not error for the court to instruct as it did. It is not true that it was for the jury to say whether a failure to exercise the utmost care, or the care which an extremely cautious man would, under the circumstances, have exercised, would constitute negligence. This was the function of the court,

1. Franklin *v.* Southern Cal. Motor Road Co., 85 Cal. 63, is reported in 2 Am. Neg. Cas. 185.

while the jury was to say whether such care had in fact been exercised.

5. It is contended that the court erred in instructing the jury that "the proof of the occurrence of the accident without fault of the passenger is *prima facie* proof of negligence on the part of the company." The claim is that the rule is not applicable to street-railway companies; citing Hastings *v.* Railroad Co. (Sup.), 40 N. Y. Supp. 93, where the cars were drawn by horses. The rule, as the trial court gave it, has been applied in this State to stagecoaches (Boyce *v.* Stage Co., 25 Cal. 460, and Bush *v.* Barnett, 96 Cal. 202, 31 Pac. Rep. 2); to elevators in buildings (Treadwell *v.* Whittier, *supra*); in the case of explosion in a dynamite factory (Judson *v.* Powder Co., 107 Cal. 549, 40 Pac. Rep. 1020), where the principle upon which the rule rests was clearly stated; in case of a steam railway while operating in the streets of a city (McCurrie *v.* Southern Pac. Co., *supra*). There is no principle upon which an exception to the rule can be made in the case of street railways, especially where operated by electricity or steam power. The reason of the rule is equally applicable to electric cars operating in a city (1).

6. The court gave the following instruction: "If you find that there was an obstruction on the rails, the question arises, 'Would the accident have occurred if there had been no obstruction?' If you find that the accident would not have occurred without the obstruction, then, subject to what I have just told you, the obstruction was the proximate cause of the injuries to plaintiff, and he cannot recover from defendant, unless, on the whole case, it has been shown by competent evidence that defendant or its servants placed the obstruction on the rails, or unless the servants of defendant could, by the exercise of the care exercised by a very cautious person, have discovered the obstruction in time to have avoided the accident." There was no evidence whatever that defendant or its servants placed the obstruction on the rails, and it is contended that it was error to assume the possible existence of a state of facts which the jury had no right to find, there being no evidence of any such facts. In People *v.* Cochran, 61 Cal. 548, it was said: "If an instruction in a case is asked which refers to facts which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury was misled by it to the prejudice of the defendant. Presumptively, however, an erroneous proposition of

1. See Boyce *v.* Cal. Stage Co., 25 Cal. 460, 9 Am. Neg. Cas. 66; Bush *v.* Barnett, 96 Cal. 202, 9 Am. Neg. Cas. 68.

law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant." If this latter statement be true, surely a correct proposition of law, under like circumstances, would not necessarily mislead the jury. In the present case there was not the slightest evidence or suspicion pointing to the defendant as having placed the obstruction on the rails, and we do not think the instruction assumes that any such evidence existed. We do not believe that the reference made to defendant in that connection could, in view of the evidence in the case, have made the slightest impression on the jury to defendant's prejudice. We advise that the judgment and order be affirmed.

We concur: SMITH, C., HAYNES, C.

PER CURIAM. — For the reasons given in the foregoing opinion, the judgment and order are affirmed.

SEWARD v. DRAPER ET AL.

Supreme Court, Georgia, January, 1901.

DANGEROUS PREMISES — BUILDING UNDER REPAIR — OWNER NOT LIABLE FOR INJURIES TO PERSON USING WINDOW AS EXIT. — One who entered a building undergoing alterations, and who sustained personal injuries because of an attempt to make his exit therefrom through a window, the framing of which was insecurely fastened, could not, though his entry was lawful, and though he honestly believed that in the existing condition of the premises it was safe and proper to use the window as a means of exit, hold the owners of the building liable for those injuries, when his presence therein was not by their invitation, either express or implied, and they in no way induced him to put the window in question to such a use.

(Syllabus by the Court.)

ERROR from City Court of Atlanta.

Action by W. I. Seward against E. E. Draper and others. From judgment for defendants, plaintiff brings error. *Judgment affirmed.*

The following are the petition and the amendment thereto:

PETITION. — "To the City Court of Atlanta, Said County: The petition of Walter I. Seward, complaining of Mrs. E. E. Draper, Mrs. Jesse McKee, and Mrs. Anna E. Wright, shows the following: 1. Said Mrs. E. E. Draper and Mrs. Jesse McKee reside in said county of Fulton. 2. Said Mrs. Anna E. Wright resides in the county of Floyd, said State. 3. Said defendants are the owners of certain real estate on the north side of N. Pryor street, in the city of Atlanta, said county, bounded on the northwest by Edgewood

avenue, and on the south by Decatur street, known as the 'Old Moore-Marsh Bldg.' 4. They have recently undertaken to repair same and change the partitions, and to cut up the first floor, originally one storeroom, into several rooms. 5. Petitioner is a barber by trade, and employed by J. C. Klein, and has heretofore been the foreman in said Klein's shop. Said Klein was negotiating with defendants for the occupancy of that portion of the first or ground floor which had been partitioned off, on corner of Edgewood avenue and N. Pryor street, and had secured an option thereon. 6. He desired petitioner, as his employee and foreman, to go with him to said store or room, and look over same, its openings, shape, etc., etc., and suggest the location of barber chairs and the other appointments of a barber shop. 7. On or about November 1, 1899, petitioner, at the request of said Klein, and for the purpose stated, went to said building. 8. They entered the building at the door on Pryor street, and sought out Mr. Geo. E. Murphey, who was employed by defendants to superintend the alterations of said building, and who was there in actual charge of same for defendants, and, stating their purpose as above set out, were invited by said Murphey to go back to said room and inspect the same. 9. At that time there was no entrance through a door to said room from Pryor street, same not having been cut out of the wall, and petitioner and Klein walked inside the building down to the room partitioned off for a storeroom, on corner of Edgewood avenue and Pryor street, and, reaching same, entered through a skeleton partition. 10. After inspecting same, they started out to Edgewood avenue. There was no door at that time leading from said room to the street, but there was a large window opening to Edgewood avenue, near Pryor street. Beneath this the floor was open for a few feet, by reason of the removal of a vault formerly built into the wall and floor. 11. Said Klein seized the framework of the said window and stepped upon the frame, and thence into the street. Petitioner followed him, and, taking hold of said framework, lifted himself towards the window, when the said framework gave way, and petitioner fell back through the opening in the floor to the basement beneath. 12. Petitioner shows that window was the then only exit from said room, and was used by the workmen and others having need to enter or leave said room, to and from the street. 13. The framework in and round said window had been removed by defendants, and in replacing same they had failed to fasten same; and, when seized, in leaving said room, — such a use as might be expected to be made of same, in the then condition of the building, — it was unsafe and dangerous, and defendants were grossly negligent therein. 14. Petitioner had

no knowledge of this danger, and was using all care and circumspection in leaving said room. 15. Said defendants were guilty of negligence in inviting petitioner to enter said room without notifying him of said danger, and warning him not to leave by said exit. 16. Said defendants were further negligent in failing to close said exit, in its then dangerous condition, and in not, by placard or watchman, forbidding its use. 17. Said defendants were negligent in that they held out said premises as ready for inspection by prospective tenants, and invited petitioner, knowing his purpose was to inspect said room, especially with regard to the opening, and knowing, or should have known, that in the course of the inspection they would exit from the window, and in failing to have the framework in said window fastened so that any one using it would not fall back into the hole beneath. 18. Having failed to fasten said framework, said defendants were negligent, under the circumstances detailed in preceding paragraph, in not warning petitioner, in the course of the inspection, not to pass through the window, or attempt to exit therefrom. 19. Defendants were negligent, in that, knowing, through their superintendent, of the condition of said premises, they invited him into the same without giving him any notice of said danger and defect. 20. Petitioner, by reason of said fall, suffered a severe injury in his right shoulder, to wit, a fractured clavicle, and severe contusions of all the soft structure around the shoulder. All the parts around said shoulder were bruised, and petitioner suffered from severe contusions upon his back. Said injuries are permanent. 21. Petitioner suffered great pain and suffering, and still suffers from said injuries, and will continue to suffer therefrom the remainder of his life. 22. By reason of his great pain, petitioner was unable to sleep without the use of opiates. 23. Petitioner used his right arm in his trade of barber, and by reason of said injury has been unable to earn anything since, and he charges that he will never have the full and complete use of said arm. 24. Petitioner is thirty-three years of age, and has a reasonable expectancy of thirty-three years, and was then earning, on an average, seventeen dollars per week. 25. Petitioner places his damages by reason of the foregoing at the sum of seven thousand dollars, and prays judgment therefor. Wherefore he prays process may issue, directed to the said Mrs. E. E. Draper, Mrs. Jesse McKee, and Mrs. Anna E. Wright, requiring them to be and appear at the next city court of Atlanta, to be held in and for said county, to answer this complaint. Mayson & Hill, Attys. Petr. Filed in office this the 26th day of December, 1899. G. H. Tanner, Clerk."

AMENDMENT. — "W. I. Seward *v.* Draper, Moore et al. (No.

11,175.) City Court of Atlanta. 1. Petitioner, by leave of the court, amends his declaration by striking the words 'After inspecting same,' and inserting in lieu thereof the words 'Following this,' in beginning of paragraph ten. 2. Petitioner further amends by saying that it was part of his business at the time of this injury to inspect said window as a means of 'exit,' and with reference to its nearness to proposed chairs, as related to the street, and it was part of his inspection to pass through said window to the street, and that defendant had knowledge of this fact, or, in the exercise of reasonable care and prudence, would have known same. Mayson & Hill, Attys. Petr. Allowed June 16th, 1900. H. M. Reid, Judge. Filed in office June 16th, 1900. G. H. Tanner, Clerk."

MAYSON & HILL, for plaintiff in error.

SLATON & PHILLIPS, for defendants in error.

LUMPKIN, P. J. — An action for personal injuries was brought by Seward against Mrs. E. E. Draper and others. His petition, after having been amended, was dismissed on demurrer, and he excepted. The material portions of the petition and of the amendment thereto appear in the official report. We agree with the trial judge in holding that the petition as amended failed to set forth a cause of action. There is no distinct allegation that the defendants themselves ever invited the plaintiff to enter the building at all. In stating how he came to go into the house, he alleges that he did so at the request of one Klein, his employer, who was merely negotiating with the defendants for a lease of a room in the building after the completion of the repairs thereon which were in progress. It is not even averred that the defendants invited or expected Klein to enter the house on a tour of inspection. The allegation that Murphey was employed by the defendants to superintend the alterations which were being made is certainly insufficient to disclose that it was within the scope of his authority as an agent of the defendants to invite people into the building for any purpose. The other allegations to the effect that the defendants had invited the plaintiff to enter the building, and that they were guilty of negligence in so doing, must be taken in connection with the facts previously set forth; and, thus viewed, they amount to no more than a mere conclusion of the pleader that the preceding statements contained in the petition as to the invitation extended by Murphey showed that the defendants were bound by his acts in the premises. Aside from all this, there is nothing in the petition which amounts to an averment that the defendants ever expected that any person entering the building on a tour of inspection would undertake to make his exit through the window described in the petition. Indeed, no facts showing that

any duty rested upon the defendants of making this window a safe means of leaving the building are stated. As to this matter the amendment merely alleges that the plaintiff considered it a part of his business to inspect the window, "as a means of exit," and that as a part of such inspection, he undertook "to pass through the window to the street." It is not alleged that the defendants ever knew or had reason to expect that he would regard the doing of such things as a part of "his business," in the prosecution of which they were under an obligation to protect him from injury. The charge that they, "in the exercise of reasonable care and prudence, would have known same," is not supported by a recital of any facts which would warrant such a conclusion.

Judgment affirmed. All the justices concurring.

PIONEER FIREPROOF CONSTRUCTION COMPANY v. SUNDERLAND.

Supreme Court, Illinois, December, 1900.

HORSE FRIGHTENED BY NOISE — COMPARATIVE NEGLIGENCE — INSTRUCTION. — In an action to recover damages for personal injuries sustained by reason of plaintiff's horse becoming frightened by noise of an electric train operated by defendant in transferring materials from its factory, and running away and throwing down plaintiff, the jury were instructed that to entitle plaintiff to recover, he must establish by the evidence that he was in the exercise of ordinary care for his own safety and protection at the time of the injury, and that, if he was injured by reason of his own negligence, he could not recover. *Held*, that such instruction was not misleading, nor was the fact that the doctrine of comparative negligence was incorporated therein reversible error (1).

JURY VIEW — STATEMENT BY COURT — INSTRUCTION. — In such action it was not improper for the court to state to the jury, at the hour of adjournment, that it would be improper for them to examine the place of accident except by agreement of counsel, and then in charge of an officer, and that they must keep away from such place, unless counsel agreed that they go in a body to see it, such statement not being an instruction as to the law of the case, but merely a direction for the conduct of the jury during the adjournment.

1. See note on Comparative Negligence, at end of this case.

For other actions arising out of Accidents Caused by Runaway Teams, due to Horses being Frightened by Noise of Trains, Steam, etc., from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

DISPOSITION OF HORSE — WITNESS — EVIDENCE. — Knowledge of witnesses as to the disposition of the horse covering a period of time prior and up to the time of the accident, rendered their evidence competent and proper as to the horse's disposition.

APPEAL from Appellate Court, Second District.

Action by W. H. Sunderland against the Pioneer Fireproof Construction Company. From a judgment in favor of plaintiff, affirmed in the Appellate Court (87 Ill. App. 213), defendant appeals. *Judgment affirmed.*

SAMUEL RICHOLSON (F. J. CANTY, of counsel), for appellant.

BUTTERS & CARR (LINCOLN & STEAD, of counsel), for appellee.

HAND, J. — This is an action brought by appellee against appellant to recover damages for an alleged personal injury. Appellee recovered a judgment against appellant in the Circuit Court for $2,000, which has been affirmed by the Appellate Court for the Second District, and this appeal has been prosecuted to this court to reverse such judgment of affirmance.

The appellant owns a factory in the city of Ottawa for the manufacture of fireproof materials, and uses therein clay obtained at pits located upon the opposite side of Fox river, which is transferred to the factory in cars upon a tramway owned by it which are propelled by a motor operated by electricity. The tramway crosses the river upon a bridge eighteen feet wide and 237 feet long, upon Main street, within the city. On the 25th day of May, 1896, a train belonging to appellant, consisting of a motor car and two cars attached thereto, loaded with clay, was going west. At the same time appellee, in company with a neighbor named Clayton, was going east, driving a horse hitched to a top buggy. As he drove upon the west end of the bridge, said train came upon the east end thereof. The horse showing signs of fright, appellee stopped him, gave the lines to Clayton, got out of the buggy, and went to his head, and attempted to control him. The train, as it approached, made a hissing, rumbling noise, which greatly excited and frightened the horse. The horse was in plain view of the motorman, and appellee claims he waved his hand, and called to the motorman to stop the train; that the train did not stop, but as it passed him more electricity was turned on, and the noise increased; that the horse became unmanageable, and ran away. Appellee was thrown down, and severely injured, his collar bone, leg, and elbow joint being broken. The declaration contains several counts, some of which charge negligence, and others wanton and wilful misconduct on the part of the agents of appellant in charge of the train.

The appellant complains that the court improperly modified its

instructions before giving the same to the jury by incorporating therein the doctrine of comparative negligence. No instructions were given on behalf of appellee, but the eleven instructions given on behalf of the appellant, when taken as a whole, plainly told the jury that, before the appellee was entitled to recover, he must establish by the evidence that he was in the exercise of ordinary care for his own safety and protection at the time of the injury, and that, if he was injured by reason of his own negligence, he could not recover. We are of the opinion that the instructions, when considered as a whole, were not misleading, that the jury were fairly instructed as to the law of the case, and that the error complained of does not constitute reversible error. In the case of Railroad Co. *v.* Matthews, 153 Ill. 268, 38 N. E. Rep. 559, in passing upon a series of instructions very similar to those given in this case (on page 269, 153 Ill., and page 560, 38 N. E. Rep.), we say: "It was not reversible error to instruct the jury in regard to the doctrine of comparative negligence, and especially so since it was so explained as to amount to no more than laying down the rule that, in order to entitle the plaintiff to recover, he must prove that he exercised due care to avoid the injury." And in the case of Coal Co. *v.* Holmquist, 152 Ill. 581, 38 N. E. Rep. 946, on page 592, 152 Ill., and page 949, 38 N. E. Rep., it is said: "Plaintiff's first instruction, although unnecessarily announcing the now obsolete doctrine of comparative negligence, is not inconsistent with the five instructions of the defendant, which require the exercise of ordinary care as a condition to the right of recovery; and when it is read in connection with such instructions it could not have misled the jury. This view is sustained by the following decisions of this court: Willard *v.* Swansen, 126 Ill. 381, 18 N. E. Rep. 548; Railroad Co. *v.* Warner, 123 Ill. 38, 14 N. E. Rep. 206; Village of Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. Rep. 246; Steel Co. *v.* Martin, 115 Ill. 358, 3 N. E. Rep. 456; Railroad Co. *v.* Johnson, 103 Ill. 512; Railroad Co. *v.* Same, 116 Ill. 206, 4 N. E. Rep. 381."

It is further assigned as error that the court instructed the jury orally in respect to visiting the scene of the accident or examining the location. It appears from the abstract: "The hour for adjournment having arrived, the court instructed the jury orally as follows: The Court: 'Observing the other suggestions made to you, I will say, also, that it would be improper for you to examine this location except by agreement of counsel, and then in charge of an officer; so that you will keep away from the location where this accident occurred, unless it be agreed by counsel that you go in a body to see it.'" In our opinion, what was said by the court to

the jury on that occasion was not an instruction by the court as to the law of the case; that it amounted only to a direction to the jury as to the manner in which they should conduct themselves during the time of adjournment, and while out of the presence of the court; and was not improper. Railroad Co *v.* Wheeler, 149 Ill. 525, 36 N. E. Rep. 1023.

The court admitted certain testimony offered by appellee concerning the disposition of the horse, which was objected to by appellant on the ground that the witnesses were persons without experience in handling horses, and incompetent to testify upon that subject. Two of them were women, who had driven the horse a number of times, and the others were men who had either driven it or seen it frequently, — one of them being a former owner. The knowledge of these witnesses as to the disposition of the horse covered a period of time prior and up to the time of the accident, and this evidence was clearly competent and proper, the weight or value thereof being left for the consideration of the jury.

Finding no reversible error in this record, the judgment of the Appellate Court for the Second District will be affirmed.

NOTE ON THE DOCTRINE OF COMPARATIVE NEGLIGENCE.

Doctrine abrogated in Illinois.

The doctrine of comparative negligence, which for several years was recognized in Illinois, is now abrogated in that State.

Beach, in his work on Contributory Negligence, sec. 26, says: "The doctrine of comparative negligence, being so entirely at variance with the accepted rule of law concerning contributory negligence, has very naturally provoked much sharp criticism, and the courts of other States repudiate it with emphasis."

In Shearman & Redfield on Negligence (5th ed.), sec. 102, the authors say: "In Illinois, the doctrine of comparative negligence was, until recently, firmly established. It is not easy to state this doctrine with accuracy; but in most of the decisions it was said that, where both parties had been guilty of negligence contributory to the injury, the plaintiff could nevertheless recover, if his negligence had been slight, compared with that of the defendant, which had been gross (citing City of Chicago *v.* Stearns, 105 Ill. 554, and several cases in which the doctrine has been affirmed). Although similar expressions were at one time used by the courts in other States, this doctrine was not finally accepted anywhere else in America, Great Britain or Ireland. It has now been abolished in Illinois."

Illinois decisions on the doctrine.

In Galena & Chicago Union R. Co. *v.* Jacobs, 20 Ill. 478, the doctrine of comparative or contributory negligence was first announced in Illinois. The whole subject was re-examined and qualified in Chicago, Burl. & Quincy R. R. Co. *v.* Johnson, 103 Ill. 512, and was again re-examined and modified in City of Chicago *v.* Stearns, 105 Ill. 554.

See also Penn. Co. *v.* Boylan, 104 Ill. 595; Abend *v.* Terre Haute & Ind. R.

R. Co., 111 Ill. 202; Hann. & St. J. R. R. Co. *v.* Martin, 111 Ill. 219, 2 Am. Neg. Cas. 661, affirming 11 Ill. App. 386, 2 Am. Neg. Cas. 491.

Subsequent cases, however, renounce the doctrine of comparative negligence.

In Calumet Iron & Steel Co. *v.* Martin, 115 Ill. 358, an action to recover for the death of a person killed by a railway train, the court held that the doctrine of comparative negligence, as announced in the earlier cases, was no longer the law in Illinois, and was not to be regarded as a correct rule of law applicable to this class of cases.

See also City of Mansfield *v.* Moore, 124 Ill. 133; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242; Lake Shore & Mich. R'y Co. *v.* Hessions, 150 Ill. 542.

Instructions on comparative negligence.

In Wenona Coal Co. *v.* Holmquist, 152 Ill. 581, it was held that an instruction announcing the now obsolete doctrine of comparative negligence is cured by others which require the exercise of ordinary care by plaintiff as a condition of recovery. In such case it was also held that the expression "some slight negligence," is equivalent to "some negligence which is slight," and that these words, in an instruction on comparative negligence, do not amount to an instruction to the jury that plaintiff's negligence was, in fact, slight.

In City of Lanark *v.* Dougherty, 153 Ill. 163, where objection was taken to instructions because they ignored the doctrine of comparative negligence, Magruder, J., said that "the doctrine of comparative negligence is no longer the law of this court. The instructions in the present case require the jury to find that the plaintiff was exercising ordinary care, and that the defendant was guilty of such negligence as produced the injury. This was sufficient, without calling the attention of the jury to any nice distinctions between different degrees of care or of negligence" (citing Village of Mansfield *v.* Moore, 124 Ill. 133).

See also Cicero, etc., R. Co. *v.* Meixner, 160 Ill. 320.

In Penn. Coal Co. *v.* Kelly, 156 Ill. 9, 17, the court, in referring to an instruction as to negligence, held that "the instruction attempts to lay down the old doctrine of comparative negligence, which is no longer in force in this State, and for that reason should have been refused."

In North Chicago Street R. R. Co. *v.* Eldridge, 151 Ill. 542, 2 Am. Neg. Cas. 713, affirming 51 Ill. App. 430, 2 Am. Neg. Cas. 532, an instruction on comparative negligence was properly refused, the defendant requesting the following instruction: "5. The jury are instructed, as a matter of law, that the burden of proof in this case is upon the plaintiff, and if you believe from the evidence in this case that the negligence of the plaintiff and defendant was equal, or nearly so, in such case your verdict should be for the defendant." The court (per BAILEY, J.), said. "The proposition embodied in the fifth instruction doubtless finds support in some of the earlier decisions of this court involving what was known as the doctrine of comparative negligence, but by more recent decisions that doctrine has been greatly modified, if not wholly repudiated. The rule to which the court is now committed by repeated decisions is, that a plaintiff, before he can recover on the ground of mere negligence, must show that the injury of which he complains was caused by the negligence of the defendant, and that he himself, at the time, was in the exercise of ordinary care. Where the party injured, at the time of the injury, is in the exercise of ordinary care, no contributory negligence is legally attributable to him, although he may not have been in the exercise of the highest degree of care.

In this case, in an instruction given by the court on his own motion, it was held, in substance, that if the defendant was shown to have been guilty of negligence, and that such negligence caused the injury to the plaintiff complained of, and if it was also shown that the plaintiff was not guilty of any negligence contributing to her injury, the verdict of the jury should be for the plaintiff, and in one of the instructions given at the instance of the defendant, it was held that if the plaintiff had failed to prove that at the time of the injury she was in the exercise of ordinary care and prudence she could not recover. In these instructions the law applicable to the question of negligence of both plaintiff and defendant was laid down with substantial accuracy and with sufficient fullness. The fifth instruction was properly refused."

Doctrine generally rejected.

Although there have been decisions in some of the States in which the doctrine of comparative negligence has been practically followed, the doctrine has been generally rejected, and, in several of the States repudiated with emphasis

See Memphis, etc., R. Co. *v.* Copeland, 61 Ala. 376; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286; O'Keffe *v.* Chicago, R. I. & P. R'y Co., 32 Iowa, 467; Artz *v.* Chicago, etc., R. Co., 44 Iowa, 284; Atch., Top. & Santa Fe R'y Co. *v.* O'Melia, 1 Kan. App. 374, 3 Am. Neg. Cas. 487; Kan. Pac. R'y Co. *v.* Peavey, 29 Kan. 180; Howard *v.* Kansas City, Fort S. & G. R. Co., 41 Kan. 408; Atch., Top. & S. Fe R'y Co. *v.* Morgan, 31 Kan. 77; Ky., etc., R. Co. *v.* Thomas, 79 Ky. 160; Marble *v.* Ross, 124 Mass. 44; Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255; Village of Culbertson *v.* Holliday, (Neb.) 1 Am. Neg. Rep. 111; Penn. Co. *v.* Righter, 42 N. J. L. 180; Wells *v.* N. Y. Cent. R. Co., 24 N. Y. 181; Wilds *v.* Hudson River R. Co., 24 N. Y. 430; Potter *v.* Warner, 91 Pa. St. 362; East Tenn., etc., R. Co. *v.* Aiken, 89 Tenn. 245; Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573; Mo., etc., R. Co. *v.* Rogers, 89 Tex. 675; Potter *v.* Chicago, etc., R. Co., 21 Wis. 377, 7 Am. Neg. Cas. 157; Bolin *v.* Chicago, St. Paul, M. & O. R'y Co. (Wis.), 9 Am. Neg. Rep. 209, in which latter case the several degrees of negligence are fully discussed by MARSHALL, J.

But in Florida and Tennessee there are statutes to the effect that where there is negligence on part of plaintiff contributing to his injury, the same may be used in mitigation of damages.

See Florida Stat. 1887, ch. 3744, sec. 1; Louisville, etc., R. Co. *v.* Howard, 90 Tenn. 144. See also South Carolina Gen. St., sec. 1529. See also, among Georgia cases, Ga. R. R. Co. *v.* Pittman, 73 Ga. 325.

In O'Keffe *v.* Chicago, Rock Island & Pacific R'y Co., 32 Iowa, 467, COLE, J., delivering the opinion of the court, says: "The well established rule of this State (Iowa) is that in an action to recover damages, for the negligent act of the defendant, the plaintiff will not be entitled to recover if his own negligence contributed directly to the injury. In other words, this court recognizes and applies the doctrine of contributory negligence and not the doctrine of comparative negligence. The latter doctrine obtains only in Illinois and Georgia, while the former obtains in the other States."

As to the rule in Georgia, referred to in the Iowa case in the preceding paragraph, Shearman & Redfield, in their work on Negligence (5th ed.), sec. 103, say: "It is frequently said that the rule of comparative negligence is accepted in Georgia. One or two Georgia decisions seem to justify this statement; but the later cases seem to hold a different rule, for which a dissenting

judge in an early case struggled hard, and, as it appears, in the end successfully, (Benning, J., in Macon R. Co. *v.* Wynn, 26 Ga. 250). This is to require the jury to mitigate damages in proportion to the plaintiff's contributory negligence, (Ga. R. R. Co. *v.* Neely, 56 Ga. 540; Ga. R. R. Co. *v.* Pittman, 73 Ga. 325; Central R. Co. *v.* Newman, 94 Ga. 560).

In Atchison, Topeka & Santa Fe R'y Co. *v.* O'Melia, 1 Kan. App. 374, 3 Am. Neg. Cas. 487, 496, the court (per JOHNSTON, P. J.), after stating that certain instructions given on behalf of plaintiff were on the border line of comparative negligence, and seemed to ignore the rule of contributory negligence, said: "The doctrine of comparative negligence has been repudiated by the Supreme Court of this State [Kansas]. Kan. Pac. R'y Co. *v.* Peavey, 29 Kan. 180; Howard *v.* Kansas City, Fort S. & G. R. Co., 41 Kan. 408; Atch., Top. & S. F. R. Co. *v.* Morgan, 31 Kan. 77."

In Hogan *v.* Citizens' R'y Co., 150 Mo. 36, the court said: "There is no comparative negligence in this State. The rule that the negligence of the plaintiff which contributed directly to the cause of the injury will prevent a recovery is without exception or qualification."

In Village of Culbertson *v.* Holliday (Neb.), 1 Am. Neg. Rep. 111, it was stated that "the doctrine of comparative negligence is not in force in this State [Nebraska]. Our courts recognize no degrees of negligence. The rule is that if a person himself, in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to, or was the proximate cause of, the injury, he cannot recover." Opinion by RAGAN, C.

In Bolin *v.* Chicago, St. Paul, Minn. & O. R'y Co. (Wis., December, 1900), 9 Am. Neg. Rep. 209-224, *ante*, the question of comparative and the various degrees of negligence are fully discussed by MARSHALL, J. The court, in that case, said: "With the exceptions noted such doctrine [comparative negligence] has not found any place in our [Wisconsin] jurisprudence, though in some jurisdictions it has become firmly established."

In Tesch *v.* Milwaukee Electric R'y, etc., Co. (Wisconsin, January, 1901), 81 N. W. Rep. 823 (reported in this volume, *post*), the court said the doctrine of comparative negligence does not prevail in this State. The doctrine in this State is that contributory negligence of the plaintiff, however slight, precludes his recovering of the defendant on the ground of negligence, regardless of the degree thereof, speaking of conduct characterized by inadvertence, not that misconduct known in the decisions of this court as gross negligence.

GUENTHER v. FOHEY.

Appellate Court, Indiana, January, 1901.

PERSONAL INJURY INFLICTED BY DOG — COMPLAINT — VICIOUSNESS OF ANIMAL. — In an action to recover damages for personal injuries inflicted by the bite of defendant's dog, the averments that the dog was fierce, and had [illegible] propensity to bite mankind, did not make the

complaint open to the objection that its allegations as to the dangerous character of the dog were conclusions, and not facts (1).

VICIOUS DOG — SCIENTER — SUFFICIENCY OF COMPLAINT. — Where the complaint averred the vicious propensity of the dog, and the knowledge of defendant, it was sufficient without showing the general disposition or habit of the dog to bite mankind.

1. See also Riley *v.* Harris (Mass. 1900), 9 Am. Neg. Rep. 47, *ante*, and the notes of cases appended thereto, for recent actions arising out of personal injuries inflicted by bites of dogs.

For other actions relating to Personal injuries Inflicted by Dogs and other Animals, see vol. 1 Am. Neg. Cas., where the same are chronologically grouped, from the earliest period to 1895, and arranged in alphabetical order of States. Subsequent actions on the same topic to date, appear in vols. 1-9 AM. NEG. REP., and the current numbers of that series of Reports.

Horse attacked by dog — Person driving thrown from wagon and injured — In WILLET *v.* GOETZ *(Michigan, January, 1901)*, 84 N. W. Rep. 1071, an action for damages for injury sustained by plaintiff in being thrown from wagon owing to team trying to escape attack by defendant's dog, judgment for plaintiff was affirmed, the court (per LONG, J.), stating the case as follows: "Plaintiff, a married woman, resided in the township of Sciota, Shiawassee county, about four and one-half miles north of Laingsburg. On September 2, 1897, she and her mother-in-law went with a horse and buggy to said village. The plaintiff was driving. She was accustomed to driving horses, and had had considerable experience in the management of them. As the parties were returning from the village, and were within forty or fifty rods of defendant's house, and nearly opposite from where defendant was at work with his team, the defendant's dog jumped over into the road, and with a bark jumped at the horse's head. The horse whirled around to escape the dog, and threw the plaintiff and her mother-in-law out upon the ground, rendering the plaintiff unconscious, breaking two ribs, and otherwise severely injuring her. On the trial, plaintiff had verdict and judgment. It appears from the testimony that this same dog had run out at the plaintiff three times before. There was considerable testimony given by the plaintiff tending to show that the defendant had had actual notice of the disposition of his dog to attack horses going on the highway, and also that this dog belonged to the defendant. There was no testimony offered by the plaintiff to show the general character and disposition of the dog to attack teams upon the highway. All the testimony was confined to the specific acts and conduct of the dog upon the various occasions mentioned. This was denied by the defendant, who was sworn in his own behalf; and he denied also that he had any knowledge that his dog had actually jumped at teams on the highway. He gave some evidence tending to show that the dog was tied up that day. He attempted to show by one of his witnesses that the actions of the dog as claimed by plaintiff were contrary to his habits and disposition. The court sustained the objection to this evidence. This is assigned as error. We think the court was not in error in sustaining the objection. In Kennett *v.* Engle, 105 Mich. 693, 63 N. W. Rep. 1009, the question was presented, fully discussed, and determined against the contention of defendant's counsel here. It was said: 'In two well-considered cases it has been determined that, where the facts concur of previous manifestations of malicious disposition by the dog, and knowledge of this fact

APPEAL from Circuit Court, Laporte County.

Action by Frank Fohey against John J. Guenther. From a judgment in favor of plaintiff, defendant appeals. *Judgment affirmed.*

W. E. HIGGINS and OSBORN & SALWASSER, for appellant.

NYE & SUTHERLAND, for appellee.

COMSTOCK, J. — Appellee brought this action against appellant, defendant below, to recover damages for personal injuries inflicted by the bite of appellant's dog. The cause was put at issue, and a trial resulted in a verdict in favor of appellee for $200. With the general verdict answers to interrogatories were returned. Appellant moved for judgment on the answers to interrogatories notwithstanding the general verdict, which motion was overruled. The errors claimed are: 1. The action of the court in overruling the demurrer of appellant to the complaint; 2, in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict; 3, in rendering judgment in favor of appellee over the objection and exception of appellant.

Appellant discusses these alleged errors in the order named, considering the second and third together. The complaint is brief, and, omitting the formal parts, is, in substance, as follows: On and prior to the 29th day of June, 1897, the defendant kept a dog which was of a fierce and dangerous nature, and improper to go at large, and with a propensity to attack and bite mankind. The defendant knew at the said date and prior thereto the nature and propensity of said dog, and wrongfully and negligently permitted it to go at large without proper restraint and confinement; and while so permitted to go at large said dog, without any fault or negligence on the part of the plaintiff, did then and there attack, bruise, and bite the plaintiff, by reason of which, etc. The objection made to the complaint is that its allegations as to the vicious and dangerous character of the dog are conclusions, and not facts. The averments that the dog was fierce, and had a propensity to bite mankind, we think, are not open to this objection.

Appellant also claimed that the complaint should aver a disposition generally or habit or custom on the part of the dog to bite mankind, coupled with appellant's knowledge of this disposition and habit. The propensity of the dog and knowledge of the owner may exist without any one having been bitten. The complaint avers the vicious propensity of the dog and the knowledge of appellant.

by the keeper, the general peaceable disposition of the dog from thence on becomes immaterial;' citing Buckley v. Leonard, 4 Denio, 500, 1 Am. Neg. Cas. 235; Mann v. Weiand, 81 Pa. St. (32 P. F. Smith) 243, 1 Am. Neg. Cas. 246."

These facts are not limited to the date appellee received the injury but it is averred that both existed at said date and prior thereto. In Graham *v.* Payne, 122 Ind. at page 406, 24 N. E. Rep. 217, the Supreme Court say: "When plaintiff alleges the mischievous or vicious propensity of the animal, the injury resulting therefrom, and the scienter, he makes a good cause upon paper, and one which the defendant must meet by a denial or an answer which confesses and avoids the alleged cause of action" (1). The court did not err in holding the complaint sufficient.

The second and third specifications of error present substantially the same question, viz.: Did the court err in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict? The general verdict finds every material fact necessary to plaintiff's recovery. It finds what appellant claims the answers to interrogatories do not affirmatively show; that is, that appellee was without fault. "Special findings override the general verdict only when both cannot stand, and this antagonism must be apparent upon the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered by a jury upon their oath." The foregoing statement of the rule is from the opinion in Amidon *v.* Gaff, 24 Ind. 128. See also Railway Co. *v.* Martin, 82 Ind. 476; City of Ft. Wayne *v.* Patterson, 3 Ind. App. 34, 29 N. E. Rep. 167; Rhodius *v.* Johnson (Ind. App.), 56 N. E. Rep. 943, and authorities there cited. In appellant's brief the special findings of fact in answer to interrogatories are treated as a special verdict, and it is insisted these special findings should affirmatively show that appellee was free from fault contributing to his injury. These findings do not purport to be a special verdict. The law authorizing special verdicts was repealed in 1897. This action was not commenced until 1899. Counsel for appellant cite numerous authorities as to the requirements of a special verdict which are not applicable to the question before us, and need not, therefore, be referred to here.

Appellee plausibly claims that the interrogatories and answers thereto are not properly in the record, and that, therefore, they cannot be considered. This question we do not decide. Treating them as properly in the record, we find no irreconcilable conflict between them and the general verdict. They show that the dog in

1. See note of Graham *v.* Payne, 122 Ind. 403, 406, in 1 Am. Neg. Cas. 403.

question was not young; that appellant had owned him for four years; that he was vicious, and was in the habit of biting mankind prior to the date at which he bit appellee; that this was known to appellant prior to appellee's injury. Appellee had knowledge of the disposition of the dog, and was afraid of him before he was bitten, and that he received the injury for which he sues upon entering a second time that day appellant's house. There is no irreconcilable conflict in these facts specially found and the general verdict. The fact that the dog was in the house at the time is not inconsistent with the finding of the general verdict that he was unrestrained and at large. A dog may be restrained in a house to which people are invited on business. The keeper of a vicious dog is bound so to secure it as to prevent any mischief to any one who is where he has the right to be. It will be presumed, in view of the general verdict, that appellee was in appellant's house on invitation of appellant, and that his conduct was that of an ordinarily prudent person under like circumstances. This disposes of all the questions discussed.

Judgment affirmed.

BELL v. INCORPORATED TOWN OF CLARION.

Supreme Court, Iowa, January, 1901.

DEFECTIVE SIDEWALK — DUE CARE — PRESUMPTION — INSTRUCTION. — In an action to recover damages for personal injuries sustained by reason of a defective sidewalk, an instruction that the law presumes, until the contrary appears, that deceased, prompted by the natural desire to avoid danger, did exercise care in approaching the sidewalk in question, which presumption would be overcome by evidence that deceased was negligent, was held erroneous, as the burden of proving freedom from contributory negligence was thereby shifted from plaintiff to defendant (1).

1. *Contributory negligence — Burden of proof — Instruction* — In CITY OF TOPEKA *v.* MYERS *(Kansas Appeals, January, 1901)*, 63 Pac. Rep. 273, an action for damages for injuries sustained by Myers on defective sidewalk, the city appealed from judgment for plaintiff on ground of erroneous instruction as to burden of proof, but the *per curiam* opinion held there was no error, stating the point as follows: "That portion of the instruction complained of reads: 'If you find from the evidence that plaintiff would be entitled to recover, but for her own contributory negligence, then I instruct you that the burden of proof is upon defendant to establish the contributory negligence of plaintiff, and this must be determined, the same as all other questions at issue, from the facts and circumstances proven in the case.'

CROSSING STREET AT POINT OTHER THAN CROSSING. — In such action it was held that the act of deceased in not following the regular street crossing and sidewalk, but, instead, crossing the street in a diagonal direction, and stepping upon the sidewalk at the place of injury, which was not at a street crossing, was not in itself such negligence as to defeat recovery.

CROSSING STREET — CONTRIBUTORY NEGLIGENCE. — It is not negligence *per se* to pass from the sidewalk to the street, or from the street to the sidewalk, at a place other than that where there is a street crossing (1).

APPEAL from District Court, Wright County.

"This action was commenced by Eliza Bell, now deceased; and the present plaintiff, her husband, has been substituted in her stead. It is for personal injuries sustained by the original plaintiff, and the claim in her behalf is that such injuries were received by reason of a defective sidewalk. Her subsequent death is claimed to have been the result of the injuries so received. There was a verdict for plaintiff, and from the judgment thereon the defendant appeals." *Judgment reversed.*

NAGLE & NAGLE, for appellant.

W. D. EVANS and PETERSON & HUMPHREY, for appellee.

MCCLAIN, J. — The walk in question was constructed of three stringers, across which inch boards were nailed; the ends projecting

The plaintiff in error in support of its contention relies upon Railway Co. *v.* Merrill, 61 Kan. 682, 7 Am. Neg. Rep. 620, 60 Pac. Rep. 819, and Railroad Co. *v.* Burrows (Kan. Sup.), 61 Pac. Rep. 442. The instruction under consideration was not misleading in the same respect as the instructions were in these cases. In the Merrill Case, the court says: 'This direction left the impression that, unless the defendants below by their evidence established contributory negligence, the defense of such contributory negligence must fall. If the testimony introduced on behalf of Merrill showed that the injury was the result of his own negligence, then there could be no recovery, even if the opposite party introduced no evidence upon that subject.' In the Burrows Case, the court says: 'By this direction the jury might have been misled into the belief that if the plaintiff, by testimony offered in his behalf, had shown contributory negligence upon his part, the same could not avail the defendant, because the fact of such contributory negligence was not established by the company.' In the case under consideration the instruction was not open to either of these objections. The court expressly told the jury, 'and this must be determined, the same as all other questions at issue, from the facts and circumstances proven in the case.' This left no room for quibble. The court specifically informed the jury that the question of contributory negligence must be determined from all the facts and circumstances proven. The court committed no error in the giving of this instruction." Judgment affirmed.

1. For other actions against Municipal Corporations Arising out of Personal Injuries Sustained by Reason of Defective Sidewalks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

beyond the outside stringers. Deceased had crossed the street at a point other than the street crossing, and in her attempt to get upon the walk she seems to have stepped on the end of one of the boards, which flew up and struck her in the face, inflicting the injuries complained of. The husband of deceased was with her at the time, but was walking ahead of her, and did not see the accident; but, on hearing the rattle of the board and an exclamation from his wife, he looked back, and saw her with her hand to her face; the board lying in front of her, wrong side up, and her face bleeding. No other witness was present at the time of the accident. The court instructed the jury with reference to the necessity of proving want of contributory negligence on the part of the deceased in connection with the accident, and, although these instructions are complained of, we do not find in them any material error. But the court said further to the jury: "2. You are instructed that it is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid danger. The law therefore presumes, until the contrary appears, that the deceased, prompted by this natural instinct, did exercise care in approaching and stepping upon the sidewalk in question, where the injury occurred. But such presumption would be overcome by evidence that satisfied the minds of the jury that she was negligent." The rule that an ordinary person, prompted by natural instincts, will use reasonable care to avoid injury, has long been recognized in this State, in connection with the rule that in an action for personal injuries plaintiff must show the exercise of reasonable care on his part, or, as it is usually expressed, the absence of contributory negligence. In Greenleaf *v.* Railroad Co., 29 Iowa, 14, it is said that it is "incumbent on plaintiff to show by direct testimony, or by presumptions arising from facts and circumstances, that the deceased was not negligent in connection with the injury," and that it is always competent for the jury "to give due weight to those instincts which naturally lead men to avoid injury and preserve their lives," and therefore that "these instincts, motives, and feelings may properly constitute evidence for the consideration of the jury." In Way *v.* Railroad Co., 40 Iowa, 341, the jury were instructed that "plaintiff is not required to produce direct and positive testimony showing just what the deceased was doing at the instant that he received the injury causing his death, that the law requires only the highest proof of which the particular case is susceptible, and that the jury might take into consideration, in weighing the evidence, the hazardous nature of the work in which brakemen are employed, and give due weight to the instincts and presumptions which naturally lead men to avoid

injury and preserve their own lives." And the court, approving this statement of the law, says: "It is objected that this shifts upon defendant the burden of proving the contributory negligence of the deceased. We do not think the instruction vulnerable to this objection. The instincts prompting to the preservation of life are thrown into the scale as evidence, like the presumptions of sanity and innocence. But when the whole evidence is considered, these instincts included, the plaintiff cannot recover unless the preponderance of the evidence is in his favor." In Dunlavy *v.* Railroad Co., 66 Iowa, 435, 23 N. W. Rep. 911, there was an instruction that "the jury may take into consideration, in weighing the evidence, the hazardous nature of the work in which the brakeman was employed, and give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives." This instruction was held to be erroneous, the court saying: "The instinct of self-preservation, planted in all persons, may, in a proper case, be allowed some weight as raising an inference of care. Way *v.* Railway Co., 40 Iowa, 345. But, where the party who has the burden of proving care can show by direct evidence what care was exercised, he should, we think, show it by such evidence; and if the direct evidence shows care, or a want of it, there is no room for a mere inference. The plaintiff was able to show by direct evidence what care he exercised. The case is different from Way *v.* Railway Co., above cited." In Whitsett *v.* Railroad Co., 67 Iowa, 150, 25 N. W. Rep. 104, the court approves the last case, and distinguishes it from the Way Case by pointing out that in the latter death had resulted from the injury, and it was material to determine just what deceased was doing at the instant of injury, and that there was no direct testimony from which that fact could be determined. The court says: "But, when the facts of the transaction are proven by direct testimony, the question whether the party acted negligently or with care is to be determined from those facts. Plaintiff testified that he, in the night-time, and when the train was in motion, jumped or stepped from the top of the box car into a narrow space between the end of the tool chest and the side of the tender, and the question was whether this was a negligent or careful act. It is manifest that the consideration that men do not ordinarily expose themselves to dangers or death can have no weight in determining that question." In Reynolds *v.* City of Keokuk, 72 Iowa, 371, 34 N. W. Rep. 167, the jury were instructed that "the natural instinct which leads all rational persons to avoid injury to their persons as far as possible is an element of evidence proper for the consideration of the jury, with all the outstanding circumstances introduced

as evidence on the question whether the plaintiff was or was not, at the time of her injury, exercising ordinary care and prudence." And the court holds this instruction to have been erroneous in that case, as it appeared that the injured person was a witness in her own behalf, saying that "where the person injured is living, and does or can testify to the facts and circumstances, and in what manner the injury was received, then there is no reason why the inference arising from the instinct of self-preservation should be indulged." In Hopkinson *v.* Knapp & Spaulding Co., 92 Iowa, 328, 60 N. W. Rep. 653, the court says that "direct and positive evidence that the injured person, who is deceased, did not by his own negligence contribute to the injury, is not required," and "where such evidence cannot be obtained it is proper for the jury to consider the instincts of men, which naturally lead them to avoid danger, as evidence of due care on the part of the person injured." In Baker *v.* Railroad Co., 95 Iowa, 163, 63 N. W. Rep. 667, the court holds that the inference which might otherwise have been drawn from the instinct of self-preservation was overcome by the evidence indicating that if deceased had been exercising due care he would not have been injured; the accident having resulted from deceased being struck by a train while he was walking along the track. In Spaulding *v.* Railroad Co., 98 Iowa, 205, 67 N. W. Rep. 227, it is held that the jury might, in an action for injuries causing death, for the purpose of determining whether deceased was negligent, "give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives," and that "it is sufficient, if it be the reasonable inference from the facts proven, that the decedent at the time of the accident was in the line of his duty, and exercising proper care." In Salyers *v.* Monroe, 104 Iowa, 74, 73 N. W. Rep. 606, which was an action to recover for injuries received by plaintiff, the jury were instructed to consider the natural instinct of man to guard himself against danger and preserve himself from injury, in determining whether plaintiff was guilty of contributory negligence. And the court says: "It is settled that such an instruction may be given where the care exercised by a person at the time of an accident which caused his death is in question, and direct evidence as to such care used cannot be had. But when there is such evidence the instinct of self-preservation cannot be given any weight."

These extracts from the leading cases in this State in which this question has been considered are sufficient to indicate that it has been fully settled that, in the absence of any direct evidence whatever, the instinct of self-preservation may be considered, and will

constitute a sufficient basis for the inference of want of contributory negligence, but that, where there is direct evidence as to whether or not the injured party was negligent, then the inference is entitled to but little, if any, weight. We suppose that the idea involved in the latter proposition is that the direct evidence as to what took place is of higher character than the mere inference to be drawn from the instinct of self-preservation; and surely it must be conceded that in such a case the inference is entitled to but small consideration, if any. But the instruction given by the court in the case we are now considering was to the effect that in view of the instinct of self-preservation a presumption arises that the injured person was careful, which presumption will prevail unless overcome by evidence satisfying the jury that the injured person was negligent. This statement of the law, if it were correct, would entirely revolutionize the doctrine, well established in this State, that the plaintiff has the burden of proving freedom from contributory negligence. If a presumption of due care is to be entertained, then the burden of proof would in practically every case be upon the defendant to show that the plaintiff was negligent. The mere statement of this proposition is sufficient to show that it is erroneous. The court was, no doubt, misled by the ambiguous use of the term "presumption," which is found in some of the cases. Frequently that word is used as indicating merely an inference which may be drawn from certain facts, and where it has been used in the previous decisions of this court in this connection it must be so interpreted. See, for instance, the language of the Baker Case, above, where previous cases are cited as holding that from the conduct of the injured person, who was engaged in the line of his employment, "aided by a presumption that arises from a natural disposition to avoid injury, the fact of diligence could well be found." But in that case it was held that the evidence of the circumstances overcame the inference based on the instinct of self-preservation. So, in the case of Dalton *v.* Railway Co., 104 Iowa, 26, 73 N. W. Rep. 349, which was an action for injuries resulting in the death of the person injured, who was struck by a train while crossing defendant's track, it was said that: "It is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid danger. Therefore it must be presumed, until the contrary appears, that the deceased, prompted by this natural instinct, did exercise care in approaching and going upon the crossing," — and that "whether the circumstances are such as to overcome the presumption that deceased, prompted by the instinct of self-preservation, did exercise the care required of him, was a question for the jury." It is

evident that what is meant here is simply that the inference to be drawn from the instinct of self-preservation was entitled to some weight in connection with the inference to be drawn from the circumstances under which the accident occurred, and that the weight of the whole evidence was a matter for the jury. So, in Crawford *v.* Railway Co. (Iowa), 80 N. W. Rep. 519, it is remarked that, as the person injured lost his life in the collision complained of, the presumption that he exercised due care must prevail; and it is said, "That such a presumption is proper and must be given weight may be conceded, but it cannot prevail against evidence which shows that he could not have exercised due care." The use of the word "presumption" as a substitute for "inference" is also illustrated by the cases of Cameron *v.* Railway Co. (N. D.), 5 Am. Neg. Rep. 454, 77 N. W. Rep. 1016, and Adams *v.* Iron Cliffs Co. (Mich.), 44 N. W. Rep. 270, upon which appellee relies. In the present case the inference to be drawn from the instinct of self-preservation could properly be considered by the jury, and we would not, therefore, be justified in sustaining the contention of defendant that there was no evidence of want of contributory negligence on the part of deceased. Burns *v.* Railroad Co., 69 Iowa, 450, 30 N. W. Rep. 25. But that is a very different thing from saying to the jury that the presumption arises therefrom, requiring evidence to the satisfaction of the jury to overcome it.

Appellant contends that the act of the deceased in not following the regular street crossing and sidewalk, but, instead, crossing the street in a diagonal direction, and stepping upon the sidewalk at the place of injury, which was not at a street crossing, was in itself such negligence as to defeat plaintiff's recovery; but we do not concur in this view. Certainly it is not negligence in itself to pass from the sidewalk to the street, or from the street to the sidewalk, at a place other than that where there is a street crossing. Whether such act is negligence in a particular case must depend upon the circumstances, and must be a question for the jury.

Without discussing the evidence with a view to determining whether there is any evidence on which a verdict for plaintiff can properly be sustained, which would be improper, in view of a new trial, the case is, for the error above pointed out, reversed.

BIGGS v. CONSOLIDATED BARB-WIRE COMPANY.

Supreme Court, Kansas, February, 1901.

TRESPASSING CHILD KILLED BY UNPROTECTED MACHINERY — DANGEROUS PREMISES — QUESTIONS FOR JURY. — In an action to recover damages for death of boy who was killed by the set screw on an unprotected shaft catching on the boy's clothing, it was held that the questions whether the boy was of sufficient intelligence to be guilty of contributory negligence, whether he could have seen the set screw and appreciated the danger of going near the same, and whether the place was dangerous and known to be such because it was attractive to and frequented by children, and whether defendants were guilty of negligence in leaving same unprotected, were questions for the jury (1).

ERROR from District Court, Douglas County.

Action by W. P. Biggs, administrator, against the Consolidated Barb-Wire Company. From judgment for defendant, plaintiff brings error. *Judgment reversed.*

R. E. MELVIN, for plaintiff in error.

W. W. NEVISON, for defendant in error.

PER CURIAM. — This is the second coming of this case. When it was here before we held that the petition stated a cause of action, and the case was remanded for trial. Biggs *v.* Consolidated Barb-Wire Co., 60 Kan. 217, 5 Am. Neg. Rep. 335, 56 Pac. Rep. 4. At the trial testimony was offered by the plaintiff which we think tended to sustain the averments of the petition, but the court sustained a demurrer to the evidence and took the case from the jury. The testimony, although not full and satisfactory in some respects, tended to show that the place where the boy was killed was attractive to children, and that children actually did frequent it with the knowledge of defendants, and that the uncovered and unprotected shaft and appliance by which the boy was killed was dangerous. There was testimony, too, that the set screw on the shaft, which caught the boy's clothing, only projected about two inches, and could not easily be seen when the shaft was in motion; that the velocity of the shaft at the time the boy was caught was from eighty to ninety revolutions per minute, and when revolving at that rate it

1. See former decision in this case, 5 Am. Neg. Rep. 335, in which the case of Price *v.* Atchison Water Co., 58 Kan. 551, 3 Am. Neg. Rep. 392, an action arising out of the drowning of a child in a reservoir, was followed.

appeared to some like a band around the shaft. It, therefore, appears that the case is substantially in the same condition that it was when it was here before. It was then held that the question of whether the boy was of sufficient intelligence, natural capacity, foresight, and judgment to be guilty of contributory negligence was for the determination of the jury; and the same may be said with respect to whether the boy could and should have seen the projecting set screw, and have appreciated the danger of going near to the same. Whether the place was dangerous, and known to be such, because it was attractive to, and known to be frequented by, children, and whether the defendants were guilty of negligence in leaving it uncovered and unprotected, were also jury questions. There appears to have been testimony tending to sustain the material averments of the petition, and, applying the views expressed when the case was here before, we must hold that error was committed in taking the case from the jury.

The judgment will be reversed, and the cause remanded for another trial.

CITY OF ROSEDALE v. COSGROVE ET AL.

Court of Appeals, Kansas, Northern Department, E. D., January, 1901.

CHILD KILLED BY FALLING INTO EXCAVATION — DANGEROUS STREET CROSSING — ABSENCE OF RAILINGS — QUESTION FOR JURY. — The city of Rosedale opened to travel twenty-nine feet in width of one of its streets, and in the remaining portion of the width of the street dug an open drain fifteen feet wide at the top, five feet deep, with sloping banks. Across this drain, to an alley, was placed a footwalk used by the inhabitants of the city. *Held*, that it was a question of fact for the jury to say whether it was negligence not to provide railings or barriers to said crossing (1).

(Syllabus by the Court.)

ERROR from Court of Common Pleas, Wyandotte County.

Action by James E. and Annie Cosgrove against the city of Rosedale. From judgment for plaintiffs, defendant brings error. *Judgment affirmed.*

1. For other actions arising out of Personal Injuries Sustained on Defective Sidewalks, and the Liability for Failure to Provide Proper Barriers at Dangerous Places, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

PHILIP ERHARDT and HUTCHING & KEPLINGER, for plaintiff in error.

EDWIN S. MCANANY, DANIEL O'BYRNE and LEON BLOCK, for defendants in error.

MAHAN, P. J. — This was an action in the Common Pleas Court of Wyandotte County against the city of Rosedale to recover damages on account of the death of the plaintiff's child, occasioned by injuries received by the child through the negligence of the city in failing to keep one of its streets in a safe condition for public travel. By the authority of the city, a drain had been excavated along the side of Oak street about thirteen feet wide, five feet deep, and several blocks in length. Across this drain, at the intersection of an alley, had been placed by some one a timber for a crossing over that portion of the street remaining intact to the property on that side of the street where the excavation existed. This crossing was left without rails or barriers, and the child of the plaintiff, seven years of age, in crossing thereon, had fallen into the excavation upon stone in the bottom thereof, and had thereby received injuries which resulted in her death. The main question was as to the responsibility of the city for the unsafe condition of this crossing. Also there was a question as to whether or not there was negligence, under all the facts and circumstances existing at the time, in the failure to erect rails or barriers to prevent accidents to those crossing the excavation. There was a trial to the court and jury, and a judgment for the plaintiff in the sum of $2,000. Upon the proceedings resulting in this judgment the plaintiff specifies the following errors of the trial court: 1. In overruling the objection of the city to the introduction of any evidence under the petition, for the reason that it did not contain or state facts sufficient to constitute a cause of action against it. 2. In overruling the city's demurrer to the plaintiff's evidence. 3. In refusing to strike out evidence with reference to the decayed place in the timber constituting the crossing, for the reason that such condition was not averred as an act of negligence in the petition. The fourth and fifth assignments of error are based upon instructions given to the jury. The sixth is based upon instructions refused which were requested by the city, and the seventh in denying the city a new trial.

In support of the first assignment of error it is urged that the sole ground of negligence alleged in the petition is that the city permitted a footbridge spanning this excavation to be without guards or side rails, and that it may be said as a matter of law that this was not an allegation of negligence at all; that, as a matter of law, it

must be held that such a bridge was reasonably safe for any person who was fit to be abroad without an attendant. We must respond thereto that it cannot be said as a matter of law that this was not an allegation of negligence upon the part of the city. Whether it was negligence or not to leave the crossing without barriers or side rails is a question of fact to be determined by the jury under all the circumstances upon the evidence at the trial. Under certain conditions it might be, and under others it would not be. See 2 Dill. Mun. Corp. (3d. ed.), sec. 1005; City of Wyandotte *v.* Gibson, 25 Kan. 236; City of Wellington *v.* Gregson, 31 Kan. 99, 1 Pac. Rep. 288; Maultby *v.* City of Leavenworth, 28 Kan. 745; Osage City *v.* Brown, 27 Kan. 74. It being a question of fact, and not a question to be resolved by the court as a matter of law, the court properly overruled the demurrer to the petition, and submitted the evidence to the jury to say whether or not, under all the circumstances, the city was negligent in omitting the barriers or side rails.

Under the second assignment of error the same proposition is urged, — that is, that the evidence showed no facts to render the city liable for omitting guards or side rails; that it showed no necessity therefor. We are of the opinion that, if there was nothing else, the evidence that the child did fall and was killed in the manner and under the circumstances under which her fall occurred is sufficient evidence for the necessity of side rails or barriers to the crossing, assuming that the city was at all responsible for the situation. It is further argued under this assignment that the evidence shows that the immediate and proximate cause of injury was not the want of railings or barriers, but that it was the intervention of an intentional act of an intelligent agency; that is, that a little boy, three or four years old, who was in the company of boys and girls crossing the footbridge, pushed the child off the crossing. The record fails to sustain this contention; that is, it does not show that the child was pushed off the crossing, but, on the contrary, it shows that while the children were all upon the footbridge, waiting for a team to pass the end of the footbridge so that they might proceed, the little girl attempted to turn about and speak to a companion, and in so doing tripped and fell.

Under the third specification it is said that the court erred in not withdrawing from the consideration of the jury all evidence in relation to the decayed place or defect in the plank or footbridge which caught the child's foot and occasioned her fall, for the reason that it was not charged in the petition as a ground of negligence upon which to base a recovery. There seems to us to be two sufficient answers to this objection. The first is that there was no objection

to the evidence, and no motion to strike it out, in the first instance; that is, the evidence disclosing the circumstances under which the child fell and came to her death. There was a motion to strike out some evidence in respect thereto at a later progress of the trial, which did not materially affect the right of the plaintiff in error. Another answer is that it was not sought to use this fact as the basis of recovery at all, but merely as a part of the occurrence, — the *res gestæ*, — and was competent to disclose the same as such. We say it was not relied upon as an act of negligence upon which to base a recovery, and there is nothing in the record which would indicate that the jury could possibly be misled into such a conclusion. The criticism of the first instruction of the court is that it left it to the jury to say whether the footbridge was reasonably safe without railings. We are of the opinion that it was a question of fact properly left to the jury to determine under all the circumstances and conditions disclosed at the trial.

The criticism of the tenth instruction of the court under the fifth assignment of error is: "Can a city be held liable for an accident happening in an unimproved part of a platted street in a remote part of a small town, and upon a footlog or plank placed by private persons, for their own convenience, across an open ravine, when such plank is not a part of any walk or traveled way erected or prepared by the city for the public travel, and when said plank or footlog is used to go from a street across the ravine onto private grounds; it being further taken into consideration that the city had provided a safe and convenient roadway, thirty or forty feet wide, along said street, ample for all travel along the same, and where such footlog is not used generally by the traveling public?" If this statement of the case was sustained by the evidence, counsel's contention might be correct, probably would be correct. The excavation was a part of the improvement of the street made by the city. The crossing, although originally made by a proprietor of an addition to the city, was adopted and used by the public as a means of crossing that part of the street in connection with that part of the street used as a roadway, and was used by the public as a matter of public convenience, and was entirely upon public ground of which the city had charge, and for the care of which it was responsible.

Under the sixth assignment of error, which is based upon the refusal of the court to give certain instructions asked by the city, and the seventh, which is in denying the motion for a new trial, and which are by counsel, in their brief, discussed together, it is said, first, that the evidence was insufficient to show any liability on the

part of the city, and in this connection is substantially repeated the statement heretofore quoted. But counsel say further that their chief objection is of a more fundamental nature; that the accident which occasioned the death of the child was not one which the city should have anticipated as a natural and ordinary result of leaving a footwalk without railings; that the footwalk was not in general use; that its use was very limited, and not by the traveling public; that in every city there are thousands of places adjacent to streets and alleys which are less safe than others, and at which accidents are happening from time to time; that it could not have been anticipated that any person fit to be abroad without attendants would fall from such a crossing, etc. Counsel are not sustained by the record in many of their assumptions of fact. The evidence discloses that this footbridge was used continuously, and for a number of years, by the public generally, but not to so great an extent as in the most populous part of Kansas City, of which Rosedale is a suburb; and it is not reasonable to say that a city should not anticipate that a fall might occur to a person crossing a footbridge fourteen inches wide and twenty feet long, five feet above the bottom of the excavation, the bottom of which was covered with rough and jagged rocks. It was for the jury to say; and it cannot be said as a matter of law that such a result was not the natural and ordinary result to be anticipated from the conditions disclosed by the evidence.

The judgment is affirmed.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. MOORE.

Court of Appeals, Kansas, Southern Department, E. D., January, 1901.

COLLISION AT RAILROAD CROSSING — "STOP, LOOK AND LISTEN" — CONTRIBUTORY NEGLIGENCE. — "Where a traveler on a country highway comes to a railway crossing with which he is familiar, and knows that a train is about due at that point, and is liable to pass at any time, it becomes his duty, as an act of ordinary prudence, to look and listen for its approach; and if the sense of sight be unavailing because of obstructions to the view, and the sense of hearing be unavailing because of preventing noises, it becomes his duty, as a further act of ordinary prudence, to stop, in order to better enable him to look and listen before entering upon the crossing; and in such a case, if, by stopping, he can see or hear the approaching train, but fails to do so, his negligence in such respect should

be declared as a matter of law, and not left to the determination of the jury as a question of fact." Atchison, Topeka & Santa Fe R. R. Co. *v.* Willey, 60 Kan. 819, 6 Am. Neg. Rep. 515, 58 Pac. Rep. 472 (1).

(Syllabus by the Court.)

ERROR from District Court, Allen County

Action by George F. Moore against the Atchison, Topeka & Santa Fe Railway Company. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

A. A. HURD, for plaintiff in error.

A. H. CAMPBELL, for defendant in error.

SCHOONOVER, J. — Defendant in error brought this action in the District Court of Allen County against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for the destruction

1. "*Stop, look and listen*" — See the Willey Case, reported in 6 Am. Neg. Rep. 515, as to duty of traveler to stop as well as look and listen before crossing railroad track.

In WOEHRLE *v.* MINNESOTA TRANSFER R'Y CO. *(Minnesota, January, 1901)*, 84 N. W. Rep. 791, an action for damages for injury to plaintiff, who, while driving across defendant's railway track on a public highway, was struck by a train, an order denying plaintiff's motion for new trial was reversed, the syllabus by the court stating the case as follows: "The rule that it is the duty of a traveler on the highway, about to go upon a railway crossing, to look and listen, to the extent of his opportunity, for an approaching train, is not always an absolute one. While he cannot omit to exercise due care in so looking and listening, in reliance upon the railway company doing its duty as to giving signals, yet under special circumstances he may regulate his own conduct in some degree with reference to the presumption that it will do its duty.

"Where it is the custom of a railway company to keep gates or a flagman at a dangerous crossing, the raised gates or the absence of the flagman, to a traveler to whom the custom is known, is an assurance of safety, and an implied invitation to make the crossing, upon which he may to some extent, but not entirely, rely and act, within reasonable limitations, upon the presumption that it is safe for him to go upon the crossing. The extent to which he may rely on such assurance is a question of fact, unless it conclusively appears that he relied exclusively thereon.

"Rules applied, and *held* that the question of the plaintiff's contributory negligence was one of fact, and that the trial court erred in not submitting it to the jury." LEWIS and COLLINS, JJ., dissented.

In ILLINOIS CENTRAL R. R. CO. *v.* CROCKERT *(Mississippi, January, 1901)*, 29 So. Rep. 162, an appeal from judgment for plaintiff and order denying new trial, judgment was reversed. MAYES & HARRIS, appeared for appellant; A. W. SHANDS and ALEXANDER & ALEXANDER, for appellee. From the statement of facts it appears that "the Illinois Central Railroad runs north and south nearly through the center of the town of Sardis, in Panola county. On the west side of the track there are some residences fronting the tracks, in one of which appellee lives, and has lived all his life. Several hundred feet south of the Crockert residence, and on the east side of the railroad, is the railroad depot. For some distance north of the depot there were three tracks,

of personal property and for personal injuries sustained by him by reason of a collision between one of the railroad company's trains and his team and wagon at a public crossing. The case was tried to a jury, which returned a verdict in favor of plaintiff. Judgment was rendered upon the verdict in favor of plaintiff, and the railroad company brings the case here.

the main line and an east and a west side track. There was a path leading from plaintiff's home to the railroad tracks and crossing them, and there was a path used by the public to a considerable extent between the main line and the east side track. On the night of November 25, 1898, plaintiff, a boy fourteen years and five months old, started from his home south to the depot on the railroad. and was caught by a train known as the 'Batesville Accommodation,' and his foot run over and crushed. On the trial, plaintiff testified that the Batesville Accommodation had been on about a week, and that it usually met the north-bound Vestibule at Sardis; that there was a switch north of his home, and that it was the custom of the Batesville Accommodation to stop at that switch, and go in on the side track, and wait until the Vestibule passed, but sometimes it did not meet the Vestibule at Sardis; and on such occasions it did not stop at the switch at all, but went down the main line to the depot before it stopped; that on the night of the injury he started from his home to go to the depot, and that when he got to the railroad tracks he noticed that the Batesville Accommodation was at the switch, and that it did not stop there at all, but was coming on down the track, and that he supposed it was on the main line, as it usually was when it did not stop at the switch, and, thinking so, he did not attempt to cross the main line, as he did not want to go in front of the train, but started in a run down the west side track, and had gone only a short distance when he was struck by the train, and his foot was run over and crushed; that when he got to the railroad track he did not stop to look and see which track the train was on, but just went running down the west track, and that it was a dark night. On his direct examination he was asked if it was the general custom of the railroad company to stop its trains before taking the switch, and he answered 'Yes.' He was then asked if it was the custom to stop all the trains. There was no answer to this question. There was a verdict and judgment for the plaintiff. Defendant's motion for a new trial was overruled, and it appealed." The court (per WHITFIELD, Ch. J.), said: "It is impossible to support this verdict even on the plaintiff's own testimony. He was plainly guilty of contributory negligence. He says the Batesville Accommodation had been on only a week, and, when asked whether all trains stopped at the switch, did not answer at all. This is utterly unsatisfactory evidence of a general custom. It is true, he was only fourteen years and five months old. But he was a bright boy, thoroughly familiar with the location and the movement of all trains. Making all due allowance for his age, it is obvious that he was mature enough and had discretion enough to make him plainly chargeable with contributory negligence on his own testimony. The mere existence of the custom — if it had been satisfactorily shown — to stop at the switch, would not relieve him of the duty of relying as well on his own prudence and use of ordinary care as on the custom. He was still bound to the use of his senses, and could not, while plainly

In addition to their general verdict, the jury returned answers to special questions submitted by counsel for the railroad company. The railroad company filed a motion asking judgment upon the special findings. The court overruled the motion, and it is of this ruling that the plaintiff in error complains. The special findings, so far as material to the questions to be determined, are as follows: "2. State what time of day the accident occurred. Ans. Between one and two o'clock P. M." "4. Was the train running on schedule

discarding their use, recover on the mere ground that the appellant had violated its rule; such violation not being wilful, but merely negligent. Reversed and remanded."

In DUMMER *v.* MILWAUKEE ELECTRIC R'Y AND LIGHT CO. *(Wisconsin, January, 1901)*, 84 N. W. Rep. 853, an action for damages for injuries sustained in a collision between wagon and street car, judgment for plaintiff for $3,733, was reversed. The court (per WINSLOW, J.), after stating the facts, said: "Whatever difference of opinion there may be upon the subject as an original proposition, it is now firmly settled as a part of the law of this State that it is the duty of a person approaching the track of an electric street railway, whether he be walking, or riding in a vehicle, to look and listen for approaching cars; and that, if he fails to do so, and is injured by a car while crossing the track, he is guilty of contributory negligence as matter of law. * * * This conclusion seems also to have the weight of judicial opinion in other States in its favor. Booth, St. Ry. Law, secs. 312, 315. This legal proposition necessitates reversal of this case, because it is admitted upon the trial and found by the jury that neither the plaintiff nor the driver of the wagon looked before they started to cross the defendant's track. It is true that the jury found, in answer to questions 5 and 6 of the special verdict, that neither plaintiff nor the driver were guilty of contributory negligence; but, the fact that they failed to look and listen having been admitted and previously found, contributory negligence was thereby established as matter of law, and the question was no longer open. Furthermore, manifest error was committed by the court in its charge with reference to the last-named question. The court charged, in substance, that, even if they did not look, still they were not guilty of contributory negligence if a person exercising ordinary care who had looked would have considered it safe to cross the track because the car was so far east; and, further, that if the plaintiff and the driver were placed in a situation of danger by defendant's negligence, and were compelled to choose one of several lines of action in the presence of imminent danger, the fact that they did not choose the best means of escape does not charge them with negligence. Both of these propositions are erroneous; the first, because it emasculates the rule requiring a person about to cross a railway track to look and listen, and the second, because it is not applicable to a case where the plaintiff, by his own negligence, has placed himself in a position of danger. As there was no motion by defendant in the trial court to strike out the fifth and sixth findings and for judgment upon the verdict, this court will not direct judgment, but will order a new trial.'

See also note on the Rule to Stop, Look, and Listen, appended to the recent Wisconsin case of Brown *v.* Chicago & N. W. R'y Co., reported in this volume, *post*.

time at the time of accident? Ans. Yes." "5. Was the engineer in charge of engine hauling that collided with plaintiff's wagon a competent, experienced, and skilful engineer? Ans. Yes." "26. Did the plaintiff stop before attempting to cross the track? Ans. No." "27. When the plaintiff, with the team, drove on the right of way from the east, and before his team reached the railroad track, if he had looked south, could he have seen the approaching train? Ans. Yes." "30. If the plaintiff had listened before attempting to cross the railroad track, could he have heard the approaching train? Ans. No." "31. If you answer the preceding question, No. 30, in the negative, then state fully why he could not have heard it. Ans. On account of the noise of his wagon." "34. Was the plaintiff well acquainted with the crossing? Ans. Yes." "35. Did he cross it frequently? Ans. Yes." "36. Was plaintiff well acquainted with the time passenger train passed the crossing where the accident occurred? Ans. Yes." "37. Did the passenger train that struck plaintiff's wagon pass the point of accident at the usual time? Ans. Yes." "42. Did the plaintiff, before attempting to cross the railroad crossing where the accident occurred, take any precaution to prevent the accident to himself? Ans. Yes." "43. If you answer the preceding question in the affirmative, then state what was done. Ans. Looked and listened." It is not urged that the special findings show that the railroad company was not negligent. Plaintiff in error rests its case upon the proposition that the findings show contributory negligence upon the part of the defendant in error. It is contended by plaintiff in error that defendant in error failed to stop, look, and listen before attempting to cross the track, and that he was, therefore, guilty of contributory negligence. In support of this proposition the cases of Railroad Co. *v.* Holland, 60 Kan. 209, 56 Pac. Rep. 6, and Railroad Co. *v.* Willey, 60 Kan. 819, 6 Am. Neg. Rep. 515, 58 Pac. Rep. 472, are cited. The first paragraph of the Holland Case is as follows: "A person who sees a railroad track upon which trains may pass at any time is already warned of danger, and it is the imperative duty of one about to cross the tracks of a railroad at least to look and listen for approaching trains. If he fails to look, when, by looking, he could see a coming train, and there is no excuse for such failure, he will be deemed guilty of negligence *per se*, and not entitled to recover for injuries sustained in a collision with a train, although those in charge of the train failed to give any signal of its approach." In the Willey Case, the syllabus is as follows: "When a traveler on a country highway comes to a railway crossing with which he is familiar, knowing that a train is about due at that point, and liable to pass at any time, it

becomes his duty, as an act of ordinary prudence, to look and listen for its approach; and if the sense of sight be unavailing because of obstructions to the view, and the sense of hearing unavailing because of preventing noises, it becomes his duty, as a further act of ordinary prudence, to stop, in order to better enable him to look and listen, before entering upon the crossing; and in such a case, if, by stopping, he can see or hear the approaching train, but fails to do so, his negligence in such respect should be declared a matter of law, and not left to the determination of the jury as a question of fact." The evidence is not incorporated in the record, and every reasonable presumption must, therefore, be indulged in favor of the general verdict. Railroad Co. *v.* Kemper (Ind. Sup.), 53 N. E. Rep. 935; Hobb *v.* Stone Co. (Ind. App.), 53 N. E. Rep. 1065. In answer to question No. 42 the jury found that, before attempting to drive upon the track, the plaintiff looked and listened. In reply to question No. 27 the jury declared that when the plaintiff drove upon the right of way, and before he reached the track, if he had looked south, he could have seen the approaching train. Here is an apparent conflict; but, applying the rule that every reasonable presumption must be indulged in favor of the general verdict, we must assume that plaintiff could not, at all times, while passing from the line of the right of way to the track, see the train. There may have been obstructions which prevented him from seeing the track except at some particular point, and it may be true that plaintiff did look and listen, though not at that particular place. But, under the rule laid down in the case of Railroad Co. *v.* Willey, *supra*, if the senses of sight and hearing were unavailing because of obstructions and preventing noises it became the duty of the plaintiff to stop, in order to better enable him to look and listen, before entering upon the crossing. In answer to question No. 26 the jury found that plaintiff did not stop before attempting to drive upon the track, and in reply to questions 30 and 31 that he could not hear the approaching train because of the noise made by his wagon. Under these circumstances it became his duty to stop. If there were no objects which obstructed the view, then the jury's finding that plaintiff looked and listened before attempting to drive upon the track is manifestly untrue, for the jury also found that the plaintiff's eyesight was good, and that the day was clear. Assuming that there were obstructions, it became the plaintiff's duty to stop. We think that the motion of defendant below for judgment upon the special findings should be sustained, and the judgment of the District Court will therefore be reversed, and the case remanded, with instructions to enter judgment for defendant.

BERRY v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Court of Appeals, Kentucky, February, 1901.

PERSON ALIGHTING FROM MOVING TRAIN AFTER ASSISTING PASSENGER — NOTICE TO CARRIER—CONTRIBUTORY NEGLIGENCE. — In an action to recover damages for injuries sustained by plaintiff while leaving defendant's train on which he had gone to bid good-by to his wife and children, and assist them to a seat on the train, it was held that defendant, in the absence of actual or constructive notice of plaintiff's presence on the train, and his intention to get off before the train started, owed plaintiff no duty to give him notice before starting the train or to hold it long enough for him to get off with safety, and defendant was not liable for plaintiff's injury, caused by leaving the train while it was in motion (1).

INSUFFICIENTLY LIGHTED PLATFORM — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE. — The fact that the platform was not sufficiently lighted is not a ground of recovery where plaintiff's injury was caused by his own negligence in attempting to alight from a moving train after it had acquired considerable speed.

APPEAL from Circuit Court, Henderson County.

Action by G. T. Berry against the Louisville & Nashville Railroad Company to recover damages for personal injuries. From judgment for defendant, plaintiff appeals. *Judgment affirmed.*

MONTGOMERY MERRITT, for appellant.

YEAMAN & YEAMAN and EDWARD W. HINES, for appellee.

BURNAM, J. — This was an action to recover damages for personal injuries sustained by appellant at Henderson, Ky., while leaving the car of appellee into which he had gone for the purpose of bidding his mother-in-law, wife, and two small children good-by upon their departure for Florida. The facts relied on in his petition to show negligence are that the employees of defendant in charge of the train knew that he did not intend to take passage thereon, but was going to get off as soon as he had seen the ladies seated; that the train did not stop long enough for him to alight in safety; that the platform in front of the depot was not properly lighted; that no notice was given before the train started; and that the conductor

1. For actions arising out of Injuries to Persons Assisting Passengers, either while Alighting from or Boarding Trains, Street Cars, etc., from the earliest period to 1897, see vols. 2–7 Am. Neg. Cas. Subsequent actions on the same topics, to date, are reported in vols 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

thereof saw him as he was about to get off, and did not admonish or warn him of the danger of attempting to do so. Appellant testified, in substance, that he went to the depot to put his wife, mother-in-law, and two small children on the limited express for Florida; that the train stopped so as to bring the entrance to the sleeping car immediately in front of the door leading to the ladies' room at the depot; that he did not intend to accompany them; that tickets and sleeping berths had been previously engaged for those of the party who intended to leave; that when they arrived at the car entrance they found the conductor and sleeping-car porter standing upon the platform near the steps of the car; that the porter took the hand packages and parcels, and entered the car first; that he was followed by his mother-in-law, then the two children, then his wife; after her came appellant, and after him came the fourteen-year-old son, who did not intend to leave on the train; that just before entering the car his wife requested him not to go on board, and that the conductor was standing close enough to have heard this remark of Mrs. Berry, but that he disregarded her request, and went on the car for the purpose of seeing her and the children seated; that after he had gotten on the inside of the car the train started, and that he hastily kissed his wife good-by, and started out, preceded by his fourteen-year-old son; that when he was out on the platform he saw a man in uniform, whom he took to be the sleeping-car conductor, and that he hastily descended the steps for the purpose of alighting, holding on to the rail with one hand; that it was so dark that he conld not see the platform, and that he thought he would feel for the platform with his foot, and in attempting to do so it was thrust under him; and that about this time he heard the conductor call out, "Steady! Be careful;" and that a thought occurred to him that he would be struck by something, and that he gave himself a turn and let loose, and that in doing so he was drawn under the car; that he was a drummer by profession, and accustomed to railroad travel. The witness Broadwell testified that, while the platform was not brilliantly illuminated, there was no difficulty in a person seeing where to put his foot in getting off, if he was careful. The witness Kriel testified that the train remained standing about the usual time, and that the place where plaintiff alighted was about 125 or 130 feet from the place where it was standing when he boarded the train. Upon the conclusion of appellant's testimony, the circuit judge, at the instance of appellee, instructed the jury to find for the defendant; and this is an appeal from the judgment rendered pursuant to the verdict so directed.

The first question arising upon the appeal is the duty which

appellee owed to appellant under the facts. It is perfectly clear that there was no necessity for appellant to have entered the coach at all. The train arrived on time, the conductor and porter were in their usual places to render all needed assistance, tickets and berths had been previously engaged, and the wife, children, and mother-in-law of appellant had entered the coach in safety. The only reason for his doing so was to bid his wife and children farewell, which might as well have been accomplished on the platform as in the car. Appellant had taken passage on the train for his wife and children, because he knew that it was a limited express, which made few stops, and traveled at a high rate of speed, thus shortening the time spent on the train between the starting point and the point of their destination. He was an experienced traveler, and knew the absolute importance of promptness in departure of that train in particular. Mr. Elliot, in his work on Railroads (sec. 1578), in discussing the duty of railroad companies to persons injured under similar circumstances, says: "The extraordinary duty of a carrier to a passenger is not, as a general rule, owed to such a person, although we have no doubt that the railroad company owes to him the duty of exercising ordinary or reasonable care. There may possibly be cases where a person assists a passenger on a train, — as, for instance, where the passenger is ill, feeble, too young to care for himself, or the like, — where it is proper to hold that the person rendering such assistance is a passenger; but, where there is no necessity for rendering it, the person giving it cannot be regarded as a passenger." In the case of Railroad Co. *v.* Crunk, 119 Ind. 542, 24 N. E. Rep. 31 (1), it was held "that, if the company sells a ticket to an invalid, who is unable to assist himself, the carrier takes upon itself the obligation of allowing him assistants to place him on the train, and seating him in the car; and the compensation paid for the ticket includes such right, and the company will owe the same obligation to his assistants while necessarily entering and leaving the car which it owes to him." In that case the passenger was a sick man, who had to be carried on board the train by Crunk and others, and those in charge of the train knew of the fact, and promised to hold the train until Crunk and the others, who were assisting him, could leave the train. None of those in charge of the train offered to assist in putting the sick passenger on board. Crunk, without loss of time, after putting the sick man on board, was leaving the train after it had started, and while in the act of stepping off the motion of the car was suddenly and greatly accelerated,

1. Louisville & Nashville R. R. Co. *v.* Crunk, 119 Ind. 542, is reported in 3 Am. Neg. Cas. 229.

which caused his injury. Another case, which holds the very opposite of the view that Berry was to be considered a passenger, is Railway Co. *v.* McGilvary (Tex. Civ. App.), 29 S. W. Rep. 68. In that case McGilvary accompanied his sister and several small children to the station, where she and the children were to take passage. He assisted them onto the train, and entered the train. The train started before he got off, and he was injured in alighting therefrom. The court said the plaintiff did not stand in the same relation to the company as a passenger, and, therefore, the liability of the company could not be measured by the standard of duty to passengers. While the plaintiff was not a trespasser, and the company was under obligation not to negligently injure him, yet whether or not the company was negligent must depend upon the knowledge the employees had of plaintiff's intention to immediately get off of the train. And quotes with approval the case of Railway Co. *v.* Miller (Tex. Civ. App.), 27 S. W. Rep. 905 (1), as follows: "The relations sustained between the railroad company and appellee did not arise out of contract, and the obligations are not such as are imposed by contract. Appellee did not go into the train as a passenger, and hence the duties imposed by law upon carriers to passengers did not rest upon the company, and govern its conduct towards him. He went upon the train upon an implied permission or license, and the company owed him the duty of ordinary care." In Doss *v.* Railroad Co., 59 Mo. 27, 21 Am. Rep. 321 (2), the facts of which were similar to those of the case at bar, the court said: "It is clear that the same degree of care on the part of the railroad company exacted by law in regard to passengers is not required of them in regard to persons who are not passengers. In the latter case nothing more is required than ordinary diligence. * * * Not being a passenger, no extraordinary care was required." In the case of Railway Co. *v.* Lawton, 55 Ark. 428, 18 S. W. Rep. 543 (3), where the facts were very similar to those in the case at bar, the court held "that such a person is entitled to demand ordinary care for his protection, and would be entitled to recover for an injury caused by its omission; but he could not recover unless he established that his injury was caused by some neglect or omission on the part of the railroad company." In Griswold *v.* Railway Co., 64 Wis. 652, 26 N. W. Rep. 101 (4), in which case the plaintiff had

1. Mo. Kan. & Tex. R'y Co. *v.* Miller (Tex. Civ. App.), 27 S. W. Rep. 905, is reported in 6 Am. Neg. Cas. 688.

2. Doss *v.* Mo., Kan. & Tex. R'y Co. 59 Mo. 27, is reported in 4 Am. Neg. Cas. 490.

3. Little Rock & Ft. S. R'y Co. *v.* Lawton, 55 Ark. 428, is reported in 2 Am. Neg. Cas. 148.

4. Griswold *v.* Chicago & N. W. R'y Co., 64 Wis. 652, is reported in 7 Am. Neg. Cas. 230.

gone to the train to meet his wife, went upon the car, and, not finding her, attempted to return to the ground, when he was injured by the sudden starting of the train, the court said that the duty of the company to a person in his situation was not absolute; that he was not a passenger, and the company owed him no duty as such; but that, if the servants of the company had been informed, or had any reason to believe, that he had gone upon the train for the purpose stated, then the company would have owed him the duty of delaying the train a reasonable time to permit him to get off; but, since it did not appear that any one was informed of his purpose, he was held not entitled to recover. And the law was ruled the same in Coleman *v.* Railroad Co., 84 Ga. 1, 10 S. E. Rep. 498 (1); Packet Co. *v.* Henry, 50 Ill. 268 (2). From these and numerous decisions bearing upon this question, we think it is clear that, if appellee had either actual or constructive notice that appellant had gone into the car for the purpose of seating his wife and children, and that he intended to get off before the train started, it was their duty to have given him notice before starting the train, and to have held it long enough for him to get off with safety; but, in the absence of such notice, no obligation existed on their part. It is no part of the duty of a conductor to listen to the conversations of persons about to take passage on his train, or to take notice of what they say. In fact, it was practically impossible to do so under the circumstances developed by the proof in this case. This was a fast train. It arrived at the station in the night, and only remained long enough to enable passengers to get off and on. A person boarding a train under these circumstances without the knowledge or request of the company is bound to know the time of the departure of such train, if such time be fixed and reasonable, public notice being given thereof, and to leave the train in season before the time so fixed as would enable him to get off with safety before the cars are set in motion. With the arrival of the time fixed for the departure of the cars the implied license or permission ceased, and with it the liability of the company. See Doss *v.* Railroad Co., 59 Mo. 27, 21 Am. Rep. 376 (3).

Appellant complains that the platform was not sufficienlty lighted. It is apparent that appellant's injury was not due to such darkness, but to his own negligence in attempting to alight from a moving train after it had acquired very considerable speed. And the fact

1. Coleman *v.* Georgia R. R. & Banking Co., 84 Ga. 1, is reported in 2 Am. Neg. Cas. 429.

2. Keokuk Packet Co. *v.* Henry, 50 Ill. 264, is reported in 2 Am. Neg. Cas. 569.

3. Reported in 4 Am. Neg. Cas. 490.

that it was dark at the point where appellant attempted to alight makes more evident his own negligence in attempting to do so. And the law is well settled, unless the alleged negligence of appellee was the proximate cause of the injury of which appellant complains, there can be no recovery. See Shields *v.* Railroad Co., 97 Ky. 103, 29 S. W. Rep. 978.

Appellant also complains that the conductor failed to admonish him not to get off. There is no complaint that he directed, or advised, or persuaded him to attempt to do so, or that the conductor knew of his purpose to get off until he was just in the act of doing so; and, as a matter of fact, he testifies that the conductor exclaimed, "Steady! Be careful," — clearly words of warning. Appellant was an experienced traveler, and as capable of appreciating the danger of attempting to alight under the circumstances as the conductor. After a careful consideration of the case, we are of the opinion that no duty imposed by law upon the appellee to appellant was neglected, and that the peremptory instruction was properly given.

Judgment affirmed.

HALL v. EMERSON-STEVENS MANUFACTURING COMPANY.

Supreme Judicial Court, Maine, December, 1900.

EMPLOYEE KILLED BY BURSTING OF GRINDSTONE — DEFECTIVE MACHINERY — EVIDENCE — FELLOW-SERVANT — INSTRUCTION — DUTY OF MASTER TO INSPECT APPLIANCE. — 1. Plaintiff's intestate was killed by the bursting of a grindstone in defendant's mill. Whether it burst from inherent defects known to the defendant, or which should have been known to it if reasonable care and inspection had been exercised, was a dominating issue in the case.

That issue the jury found for the plaintiff. Although the evidence was conflicting, the court cannot say that the jury erred in the finding.

2. Defendant claimed that the stone slipped in its collar, and thus caused the bursting, and requested an instruction that, if so caused, and "that resulted from the adjustment of the stone by Lester Knox, the defendant is not responsible, as he was a fellow-servant" of plaintiff's intestate.

Another requested instruction was that, "if the defendant exercised ordinary care, and fulfilled its duty in the selection of the stone up to the time when Knox began to run it, it was not the duty of the company to subsequently examine the stone." Both requests were refused.

As to the first, it is *held* that the suitable adjustment of the stone was the duty of the master; that, if such duty was delegated to a servant, and he was

negligent in its discharge, such negligence was that of the master, for which he is responsible.

As to the second request, it is *held* that if the stone, before hanging and turning off, presented a shelly and unsafe appearance, and such appearance indicated a possible or probable lack of cohesion throughout its structure, even if, when the shelly place was turned off, it then appeared sound, and its use seemed to be justified, still, if the original apparent defect was such as to suggest a doubt as to its interior cohesive quality to a man of ordinary prudence and sagacity, it was the duty of the defendant to resolve the doubt by subsequent examination (1).

(Official.)

EXCEPTIONS from Supreme Judicial Court, Kennebec County.

Action by Aroline E. Hall against the Emerson-Stevens Manufacturing Company. On verdict for plaintiff, there was a motion for new trial, and exceptions by defendant. *Motion and exceptions overruled.*

1. For other actions arising out of Injuries to Employees Caused by Defective Machinery, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

In ROUNDS *v.* CARTER *(Maine, January, 1901)*, 48 Atl. Rep. 175, an action by Charles B. Rounds, administrator of one Daniel T. Dooley, who was killed at Calais, May 27, 1898, by falling from a car belonging to a construction train used by the defendant, John B. Carter, in certain parts of the works of building the Washington County Railroad, the jury returned a verdict for the plaintiff for $3,000, and on motion for new trial the same was granted. The official syllabus is as follows: "1. In operating machinery, or in the ordinary use of appliances furnished, a servant assumes the risk of injury from the negligence of his fellow servant, if the servant employed is competent for the service required of him.

"2. Supplying safe machinery and appliances is one thing. The operation in the business for which they are used is another.

"3. A platform car used by a contractor to convey sleepers had four stakes standing at the forward end of the car in the usual places, one of which was too long to clear a bridge under which the train passed. Either the jar of the car by the striking of the stake against the bridge, or the rebound when it cleared it, caused the plaintiff to fall to the track, where he was killed.

"The stake was not a permanent fixture to the car, and had been placed there by a fellow-servant. It was an instrumentality only, used when needed, then discarded.

"*Held*, that loading the cars, and the necessary binding or otherwise securing the articles transported, when they were of such character as to require it, including the selection of stakes from a large and suitable quantity furnished, pertained to the ordinary use of the car, within the scope of the servant's employment, and to which the duty of the master did not extend."

In SMALL *v.* ALLINGTON & CURTIS M'F'G. CO. *(Maine, January, 1901)*, 48 Atl. Rep. 177, an action by Albert E. Small against the Allington & Curtis Manufacturing Company to recover for personal injuries, where there was a verdict for $500 for plaintiff, defendant's motion for new trial was granted. The official syllabus is as follows:

"Action to recover for the death of the plaintiff's intestate, brought under chapter 124 of the statute of 1891. The plea was the general issue; the verdict for the plaintiff in the sum of $1,500. The plaintiff alleged that her intestate, Charles E. Hall, was killed by the bursting of a grindstone while at work in the scythe shop of the defendant corporation in Oakland on the 5th day of May, 1899, and that the defendant's machinery which was furnished the said Hall to work with in said shops was defective, which defect caused his injury and death."

Argued before WISWELL, Ch. J., and WHITEHOUSE, STROUT and FOGLER, JJ.

W. T. HAINES, for plaintiff.

H. M. HEATH and C. L. ANDREWS, for defendant.

STROUT, J. — Hall, the plaintiff's intestate, was killed by the

"1. The doctrine that a superior servant is on that account a vice-principal, representing his master, rather than a fellow-servant with others employed by the same master and engaged in the same work, does not prevail in this State, and is not supported by the weight of authority. The master's liability to one servant for the negligence of another in no way depends upon the superior rank of the negligent servant.

"2. A servant of any grade may be employed in the discharge of the particular and personal duties which the master owes to the servant, as when he is engaged in the duty of providing safe, suitable, and sufficient machinery and appliances. While engaged in such employment, although at other times he may be only a fellow-servant with other employees, he becomes a vice-principal, and his master is liable for his negligence, because the performance of these duties cannot be delegated by a master, so as to relieve himself from the consequence of negligence in these respects.

"3. The test which determines the master's liability for the negligence of one employee whereby injury is caused to another, is the nature of the duty that is being performed by the negligent servant at the time of the injury, and not the comparative grades of the two servants.

"4. *Held*, that the evidence in this case does not disclose any negligence upon the part of the defendant; that the accident whereby the plaintiff sustained injury was caused by the negligence of the plaintiff and his fellow-servants, or some one of them; and that the defendant had performed its full duty when it had provided suitable appliances necessary for the work that was being done at the time of the accident, and had employed competent and sufficient workmen.

"5. Held, also, that the defendant's superintendent, although occupying the position of a vice-principal while engaged in the performance of those duties that the defendant owed to its employees, in providing all necessary and proper appliances and materials, in the performance of the work that was being done at the time of the accident was a fellow-servant of the plaintiff, who was employed and engaged in carrying out the same purpose, and that, even if any negligence could be attributed to the superintendent in the performance of this work, it was the negligence of a fellow-servant, for which the defendant is not liable."

bursting of a grindstone on which he was at work in defendant's mill. He was at the time in the service of the defendant as a scythe finisher, and was rightfully using the stone in doing the work for which he was employed. The stone was suspended over a spindle, which run through it, but did not come in contact with it. It was held by collars of iron, fitted with a flange for holding disks of wood. One collar was stationary with the spindle, the other adjustable and movable, held in place and adjusted by a nut working on a powerful screw. It was not controverted that such was the usual and proper method for hanging the stone. The adjustment of the collars is a matter of nice and careful judgment.

Lester Knox did all of the scythe grinding by the piece. Defendant furnished the machinery, and each scythe grinder selected his own stone from those furnished by the defendant, and, with the assistance of his fellow grinders hung it as a part of his price by the piece. This stone was hung by Knox. Plaintiff's intestate, as a scythe finisher, had the right to use the grinding stones for grinding dies or other tools. He had nothing to do with the selection or hanging of the stones.

When it burst, it split transversely into two parts of about equal size. It was not then running at a dangerous speed. At the trial the cause of the bursting was sharply contested. Plaintiff claimed that this stone was defective, and unsuitable for the purpose, and that this was known to the officers of the defendant, or should have been known to them if they had exercised proper care and caution; and that the bursting was the result of such defect. The defendant denied this, and assigned as the cause that the stone slipped in the collar, and dropped upon the spindle, and was thus thrown out of its true and even bearing, and that this produced the result.

It was also claimed that, if such slipping was in consequence of negligent hanging by Knox, or in taking proper precautions, after it was hung, to correct any fault that arose from its operation, such negligence was that of a fellow-servant, for which defendant is not responsible.

Defendant made three requests for instructions, which were not given, and took two exceptions to the charge.

The first two requests need only be noticed, as the learned counsel concedes that, if these were rightfully refused, all the other exceptions must be overruled. The first request was, "If the jury are satisfied that the defendant exercised ordinary care and fulfilled his duty in the selection of the stone up to the time when Knox began to run it, it was not the duty of the company to subsequently examine the stone, and for any failure on the part of Knox to report

the crack testified to by Foster the company would not be chargeable with negligence."

Although the company would not be in fault for failure of Knox to report a crack which he discovered while operating the stone as defendant's servant, it cannot be stated as an absolute proposition of law that it was not the duty of the company to examine it after it was put in operation. Whether such duty devolved upon it depended upon circumstances and considerations which should be taken into account. If the stone, before hanging and turning off, presented a shelly and unsafe appearance, and such appearance indicated a possible or probable lack of cohesion throughout its structure, even if, when the shelly place was turned off, it then appeared sound, and its use seemed to be justified, still, if the original apparent defect was such as to suggest a doubt as to its interior cohesive quality to a man of ordinary prudence and sagacity, it was the duty of the defendant to resolve the doubt by subsequent examination. Cole *v.* Manufacturing Co., 63 N. J. Law, 626, 7 Am. Neg. Rep. 93, 44 Atl. Rep. 647 (1).

The stone had been in the mill a year as a rejected stone, from its apparent condition. It was the only one there near the close of the grinding season in the spring of 1899, when one was needed to finish the work. It was hung doubtingly and experimentally, as stated by Pinkham, to test it by turning down. If, when the shelly place was turned off, it appeared sound, yet whether, with knowledge of its previous condition, the care and judgment defendant was required to exercise suggested a probability that it still lacked cohesion, and might be dangerous to use, and therefore called for careful subsequent examination, was a matter for the jury to determine.

The master's obligation to his servant "involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they came to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risks of the business, to enable him reasonably to protect his servants from a danger which he should prevent." Moynihan *v.* Hills Co., 146 Mass. 592, 16 N. E. Rep. 574.

The difficulty with the request is that it crystallized both law and fact into an absolute rule of law, and, therefore, was rightly refused.

1. See note, at end of the Cole Case, on the question of Assumption of Risk, 7 Am. Neg. Rep. 97-111.

The second request was, "If the injury was caused by the slipping of the stone on the collars, and that resulted from the adjustment of the stone by Lester Knox, the defendant is not responsible for such act of Lester Knox, as he was a fellow-servant of Mr. Hall."

The duty of the master to his servant is well stated in Johnson *v.* Boat Co., 135 Mass. 213, where it is said: "The master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping or maintaining such servants, structures, or engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty." The same doctrine has been uniformly held by this court. Buzzell *v.* Manufacturing Co., 48 Me. 116; Donnelly *v.* Granite Co., 90 Me. 110, 2 Am. Neg. Rep. 791, 37 Atl. Rep. 874. If the master delegates this duty to a servant, and he is negligent in its performance, such negligence is that of the master, for which he is responsible. Elmer *v.* Locke, 135 Mass. 577; Hough *v.* Railway Co., 100 U. S. 218.

Great care and good judgment were required in the selection of the stone and its hanging. It was a part of the machinery and appliances for defendant's business, which were within the duty of the master. In discharging that duty, Lester Knox, though for most purposes a fellow-servant of Hall, stood in the place of the master. If, in the adjustment of the stone by him, he failed to exercise due care, and in consequence, the stone slipped, and Hall was thereby injured, the defendant was responsible if Hall himself was free from fault.

If structures and appliances furnished and set up by the master are sufficient and reasonably safe, the operation of the machine is within the duty of the servant; and the care, supervision, and incidental changes, such as oiling, changing rolls or gears which are needed in the orderly running of the machines, are regarded as the business of the servant, as to which his negligence is not imputed to the master. Johnson *v.* Boat Co., *supra.* This request was rightly refused.

Upon the issue of fact the testimony was voluminous and contradictory. The jury found for the plaintiff, and we are asked to set the verdict aside as against the evidence.

It appears that this stone came to the mill, with others, in April, 1898. When it arrived, Pinkham, defendant's treasurer and general

manager, was sick, and absent from the works. During his absence, Andrews, defendant's bookkeeper, was manager. Lester Knox, the grinder, called the attention of Andrews to it. Andrews says he saw a "shelly place on it;" he "didn't know whether best to hang it or not;" he "didn't want to take any responsibility." He told Knox he "guessed we wouldn't take any chances on it. We would get another stone." That this stone was deducted from the bill, and another shipped by the shipper, nothing being paid for this one. He says the stone "was cracked" when it came. He does not claim to be a judge of the quality of stone.

He also says that just before they had got through grinding, in the spring of 1898, Knox wanted a stone to finish the grinding; that this was the only one left, but it was not used, and another was sent for.

The accident happened May 5, 1899. About ten days prior to that this stone had been hung, and during that time had been in use. Defendant's witnesses say there was a shelly place on its side, and that, by direction of Pinkham, it was hung tentatively, to turn off the shelly place, with the view of ascertaining whether it was sound below that; that the shelly place was ground off, and that the stone then appeared sound. Some of the witnesses say that after this a small seam appeared on the face of the stone, which was ground off on using. Plaintiff's witnesses say a crack was developed, which spouted water, which they regarded as a danger signal. This was denied by witnesses for the defense.

There was much conflicting testimony as to the appearance and condition of the stone after it burst. Some witnesses say they discovered a crack; and iron rust, indicative of a previous crack. Other witnesses deny any such appearance. The stone itself was brought to court, and examined by the jury. The question of the quality and condition of the stone, whether defective or not, and, if defective in fact, whether it was known to the officers of the company, or should have been known if they had used reasonable diligence to ascertain, and whether such defect caused the stone to burst, was submitted to the jury under clear and careful instructions. Upon this issue the jury have found in favor of the plaintiff.

Without reviewing the evidence, it is sufficient to say that there was testimony which, if believed, would justify the finding. It is true, there was strong conflicting testimony. It was the province of the jury to determine what the fact was. Other minds might have reached an opposite conclusion. We cannot say that the verdict is clearly against the evidence, nor do we see any ground for disturbing it for bias or misapprehension.

Exceptions and motion overruled.

SMITH v. STATE (TO USE OF WALSH.)

Court of Appeals, Maryland, January, 1901.

LANDLORD AND TENANT — DEFECTIVE PREMISES — LANDLORD NOT LIABLE FOR INJURY TO SUB-TENANT. — In an action brought for use of Walsh to recover for loss of services of his child, who was killed by falling from an alleged defective balustrade on the porch of a house owned by Smith and rented to another, who sub-let rooms to Walsh, it was held that the owner of the house was not liable, as, in the absence of fraud or concealment the landlord of the original tenant is not responsible for any injury sustained by a subtenant, by reason of the condition of the premises when rented or afterwards (1).

1. For other actions between Landlord and Tenant, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

In VANCE ET AL. *v.* SAN ANTONIO GAS CO. *(Texas Civil Appeals, December, 1900)*, 60 S. W. Rep. 317, an appeal from judgment for defendant rendered in Bexar County Court, judgment was reversed, the court (per JAMES, Ch. J.), stating the case as follows: "A careful consideration of the assignments of error satisfies us that they are not well taken, except the fourth, which complains of the following special charge given at the request of defendant: 'If you believe from the evidence that the plaintiffs had leased the entire one-story portion of the building, and that plaintiff's lessees were at the time of the injury complained of in possession of said entire one-story portion, you are instructed that plaintiffs cannot recover for any injury to such one-story portion.' The action was for damages to a certain building by placing electric wires therein and injuring the walls and roof thereof between certain dates. Plaintiffs were the lessors of Frank Bros., of the lower story of the building. This was the testimony of plaintiff Skinner. The charge practically directed a verdict for defendant if this was a fact, so far as damages to the lower story were concerned; and appellee undertakes to justify this charge upon the ground that plaintiffs had leased said lower story to Frank Bros., who were and are still in possession, and therefore plaintiffs were not entitled to recover for damages to this part of the building. This is not the law. Railway Co. *v.* Ragsdale, 67 Tex. 28, 28 S. W. Rep. 515. For injuries to the possession Frank Bros. would properly have recovered, but for injuries to the building plaintiffs had the right to sue. This right was not affected by the fact that the tenants may also have been liable to plaintiffs upon an obligation to restore the premises to plaintiffs at the close of their term in reasonably good condition. There was testimony that Skinner paid for making the repairs, on complaints of Frank Bros.; and, if this were so, it would relieve the case of any difficulty as to Skinner's right to sue for injuries to the house. Reversed and remanded." W. W. KING, appeared for appellants; GEO. R. HINES, for appellee.

ACTION by the State, for the use of Michael J. Walsh, against Mary E. Smith and another. From a judgment for plaintiff, defendant appeals. *Judgment reversed.*

LOUIS P. HENNIGHAUSEN and CHARLES F. STEIN, for appellant.

HORTON SMITH and WM. M. BALLOU, for appellee.

BOYD, J. — This action was brought for the use of Michael J. Walsh, the father of Sarah Walsh, for loss of the services of his child, who was killed by reason of the alleged negligence of the appellant and Neptune E. Bowden in wilfully and knowingly allowing a balcony on a house owned by the appellant, and rented to Bowden, to be in a dangerous condition. Mrs. Smith had owned the house since July, 1893, and some time in 1897 her agent rented it to Mr. Bowden, who continued to hold it, as monthly tenant, until after the accident, which happened on the 20th of August, 1899. She made no agreement to repair it or keep it in repair. Having a housekeeper in charge, the tenant rented one or more rooms to those applying for them. Walsh rented from the housekeeper, on the 19th of August, 1899, a front room on the second floor, and the next day took his child Sadie, who was five years and six months old, to the room. There was a back building along which a porch ran from the second story of the front building. Three rooms opened on the porch, and there was a stairway leading from the middle of it (between two of the rooms) down to the yard. Mrs. Sheckels, who was an acquaintance of Walsh, occupied the rear room, and in the afternoon of the 20th of August the little girl, with the permission of her father, went to Mrs. Sheckels' room to get some water, which she got, and started along the porch towards her father's room. Mr. Scott, who occupied the middle room on the porch, saw her go to Mrs. Sheckels', and just after she passed his window a second time he heard something fall. He then went onto the porch and saw the child lying below on the bricks. The balustrade had several openings in it, the balusters being out; the theory of the plaintiff being that the child fell through the one near Mr. Scott's door. He said that opening was about three feet wide, and the child was lying below it, and a "picket," as he called it, was lying by the child when he found her. She was killed by the fall. The testimony shows that the balustrade was in a bad condition, and had been for some time. Some of the witnesses thought it had been for some years, judging from the appearance and condition of the wood; but that was a conjecture. Mrs. Sheckels said, however, it was when she went there in December, 1898, and that it got worse; that the balusters would fall out if you touched them. It was admitted by the plaintiff's witnesses that the floor of the

porch was sound. Some question seems to have been raised in the testimony as to the right of Walsh to use the porch, but his own evidence, as well as that of some of the other witnesses, was to the effect that it was used by all the occupants. That was the way, and apparently the only convenient way, to get into the yard, unless they went into the front hall. A number of prayers were passed on by the court, but, under the view we take of the case, it will only be necessary to consider the one which was refused, denying the right of the plaintiff to recover at all against the appellant. The case was dismissed by the plaintiff as to Bowden, and a judgment was obtained against the appellant, from which this appeal was taken.

The theory of the appellee is that at the time the property was rented it was unsafe and in a dangerous condition, which the owner knew, or could, by the exercise of reasonable diligence, have known, and, therefore, she was responsible to any one lawfully on the premises, who was injured by reason of that condition, although the property was in the possession of her tenant when the accident happened. In support of that position he relies upon Owings *v.* Jones, 9 Md. 108; Albert *v.* State, 66 Md. 325, 7 Atl. Rep. 697; State *v.* Boyce, 73 Md. 469, 21 Atl. Rep. 322; and other cases of a like character. There is no question about the responsibility, to strangers, of a landlord who leases premises which are a nuisance, or must become so by their user, and receives rent, whether he is in possession or not, if injury ensue. Nor do we doubt that he may be liable to strangers if he rents his property when it is in such condition as will likely produce injury; and, if the property be of a public character, he cannot with impunity rent it in an unsafe condition, and, if he does, may be required to answer to those who are brought upon it at the instance of his lessee for injuries they sustain. Our own cases have determined the liability of the owner in such cases. The injury complained of in Owings *v.* Jones was received by falling into a vault appurtenant to the property of the defendant, and built under the pavement of a public street. The boy who was injured was on a public street at the time, where he and the public had a right to be; and if the owner leased the premises with the vault appurtenant to it, which was either a nuisance at the time of the demise, or must, in the nature of things, become so by its user, then he was unquestionably liable, and could not protect himself by proving that at the time of the injury it was no longer in his charge. So, in Albert *v.* State, and State *v.* Boyce, the same principles are applied to the owners of public wharves. As was said in Albert's Case: "A wharf furnishing the only mode of ingress and

egress to a summer resort, where crowds are invited to come, if in an unsafe and dangerous condition, is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition, or having, by the exercise of any reasonable care, the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors." And other cases might be cited, such as Railroad Co. *v.* Rose, 65 Md. 485, 4 Atl. Rep. 899; Irwin *v.* Sprigg, 6 Gill, 200, and Condon *v.* Sprigg, 78 Md. 330, 28 Atl. Rep. 395, to illustrate the duty of owners of property to protect the public against injury resulting from nuisances on or appurtenant to their premises when the public has a right to be there.

But those cases do not reach the question before us, which is: In the absence of fraud or concealment, is the landlord of the original tenant responsible for any injury sustained by a subtenant, by reason of the condition of the premises, when rented or afterwards, — such as a defective balustrade on a porch? There is no implied covenant requiring the landlord to make repairs. Gluck *v.* City of Baltimore, 81 Md. 326, 32 Atl. Rep. 515. "There is no implied warranty on a lease of a house or of land that it is or shall be reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property." "When a lease contains no express contract of warranty that the property is or shall be fit for the purpose for which it may be rented, there is no implied warranty to that effect; and, in case the property falls down in consequence of some inherent defect, the lessor is not bound to repair, and yet the lessee will be compelled to pay the rent." Hess *v.* Newcomer, 7 Md. 337. After fully recognizing the landlord's liability to third persons not claiming under the tenant, it is said in Tayl. Landl. and Ten., sec. 175a, that: "The lessor's liability to the lessee is, however, much more restricted. As the former does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their state, for any injury suffered by him during his occupancy, by their defective condition, or even faulty construction, he cannot make the lessor answerable, unless there was misrepresentation, active concealment, or perhaps a total inability on the tenant's part to discover the defect before entering." There are many cases to that effect, of which we will mention Doyle *v.* Railway Co., 147 U. S. 413, 13 Sup. Ct. Rep. 333; Moynihan *v.* Allyn, 162 Mass. 272, 38 N. E. Rep. 497; Gallagher *v.* Button (Conn.), 8 Am. Neg. Rep. 5,

46 Atl. Rep. 819; Peterson *v.* Smart, 70 Mo. 34; Burdick *v.* Cheadle, 26 Ohio St. 393; Purcell *v.* English, 86 Ind. 34; Brewster *v.* De Fremery, 33 Cal. 341; Murray *v.* Albertson, 50 N. J. Law, 167, 13 Atl. Rep. 394; Cole *v.* McKey, 66 Wis. 500, 29 N. W. Rep. 279; Towne *v.* Thompson, 68 N. H. 317, 44 Atl. Rep. 492; Bowe *v.* Hunking, 135 Mass. 380; Whitmore *v.* Paper Co., 91 Me. 297, 39 Atl. Rep. 1032; Jaffe *v.* Harteau, 56 N. Y. 398. The reason of the rule is perfectly apparent. If the lessee knows the condition of the premises, and rents it without requiring the owner to repair it, he takes it as he finds it, and has no right to complain of injuries sustained on account of its condition. The owner not being compelled to keep it in repair, if the tenant desires to require that of him, he should so bind him by contract. In the absence of that, he must protect himself against dangers which are apparent to him. A building may be perfectly safe and suitable if used for certain purposes, while it may not be for others, and, if the tenant has had opportunity to inspect it before he rents it, the landlord cannot anticipate that he will use it in a way his intelligence and observation ought to tell him not to use it. If Bowden had been injured by reason of a defect such as is complained of here, he would have had no right to recover against the appellant. The defect was as apparent to him as to his landlady; and if he, with full knowledge of its condition, entered upon the premises, the principle of *caveat emptor* applies. If that were not so, no landlord would be safe in renting premises out of repair, although the tenant agreed to so accept them. As was said in Robbins *v.* Jones, 15 C. B. (N. S.) 240, "Fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any" (1). Nor does the plaintiff occupy any better position than Bowden would have done if he had sustained the injury. In Tayl. Landl. and Ten., *supra*, the author follows what we have already quoted by adding: "And the subtenant, servant, employee, or even customer of the lessee is under the same restriction; because entering under the tenant's title, and not by any invitation, express or implied, from the owner, they assume a like risk." This is quoted with approval in

1. In Robbins *v.* Jones, 15 C. B. (N. S.) 221, it appeared that a row of houses stood a few feet from a raised causeway, the center of which was a carriage road, the sides being foot pavement. The ground floor of the houses was on a lower level than the causeway. There was a continuous structure, consisting of flagstones and gratings, from the row of houses to the foot pavement, with which it was on a level; an outer door of each house opened upon this structure; it had been dedicated to the public, and used by them as part of the highway for foot passengers. The carriage and foot roads on the causeway were repaired by the parish. The structure became

Cole *v.* McKey, *supra;* Clyne *v.* Holmes (N. J.), 4 Am. Neg. Rep. 180, 39 Atl. Rep. 767. See also Towne *v.* Thompson, *supra;* Bowe *v.* Hunking, *supra;* Whitmore *v* Paper Co., *supra;* Robbins *v.* Jones, *supra.* In Jaffe *v.* Harteau, *supra,* it is said: "The defendant, having leased the premises to Van Duzer, incurred the same liability to his subtenants for the safety and sufficiency of the premises for the use for the purposes for which they were intended as they were under to him. It is not claimed by the appellant's counsel that the obligation to a subtenant is, in this respect, any greater than that to the lessee." Walsh was a subtenant. He was not there by invitation of the appellant, express or implied, but was there as a tenant of Bowden. There can be no doubt, under the testimony, that he had the privilege of the use of the back porch; but that cannot help his contention. There are cases in which it is held that when the owner of a house rents rooms in it, and reserves the hallways and porches to be used in common by the tenants, the landlord will be liable for their condition; but that is because he has kept them under his control, and no one tenant is under obligation to keep them in repair. But, without stopping to determine whether Bowden might, under the circumstances, have been responsible for the defective condition of the balustrade, the appellant had not reserved any part of the premises. She had rented the whole property to Bowden, and had not retained control over any part of it. He had been in possession of it for over two years, and there is not the slightest evidence to show either that the appellant knew of its dangerous condition or had been called upon or requested to repair it. It is true that some of the plaintiff's witnesses said that from their examination of the wood after the accident they were of opinion that it had been rotten for years. But there is no evidence that the appellant knew, or had any reason to suppose, that it was in such condition. This accident happened, so far as can be told from the testimony reflecting on that subject, by the child falling through a hole in the balustrade, caused by some of the balusters falling out. There is no evidence they were out when the property was originally rented, and surely a landlord who rents a

in a bad state of repair, and owing to this, a person fell through one of the gratings forming part of it, and was killed. *Held,* in an action by his administrator against the lessee of the houses, that the structure was part of the highway, and that the parish was bound to repair it, and that, therefore, the action against the lessee was not maintainable. *Held,* also, that if a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way, as a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby.

house as this was rented is not required to examine each month to see whether there are any balusters out of a balustrade, or any similar defect in the premises, especially when he is under no legal obligation to make repairs if he finds any needed. But, if she had known the balustrade was thus defective, either when she originally rented or afterwards, she would not have been liable to the tenant or the subtenant, as is shown by the authorities cited above.

If a landlord is to be held responsible for injuries resulting as this did, at the instance of a subtenant, who had the same opportunity to know the condition of the premises as any other tenant would, it would be a responsibility that few would care to assume. Walsh had been over the porch the day of the accident, and had also lived in the house on a previous occasion, a few months before the child was killed. He, therefore, knew, or had the opportunity to know, the condition of the balustrade. Mrs. Smith did not know it, so far as appears from the record, but, according to the contention of the appellee, she is to be held responsible merely because she is the owner, although the house was not in her possession, but was in that of her tenant's tenant. Bowden himself unquestionably could not have recovered for an accident, but Walsh, who only had the right to be there through Bowden, seeks to do so because he claims to be a third party. If that could be done, then, after a landlord has rented his house to a person who took it as he found it, the latter could make him responsible to a half dozen or more persons by simply renting out a room to each with the use of the halls and porches in common. We do not understand the law to go to that extent. On the contrary, when one goes into possession of premises, or part thereof, with the right to use other parts in common with the other tenants, as a subtenant, he occupies no better position against the owner than the original tenant would for injuries sustained by reason of the defective condition of the premises, which was equally apparent to all observers. A few nails and a board or two would have remedied this trouble; and certainly, in the absence of notice to her, the appellant might well have assumed that neither Bowden nor those occupying the rooms would permit the balustrade, or any part of it, to give way or remain away, to the danger of any one, when it could so easily have been fixed, so as to have avoided such an accident as occurred.

Albert's Case and others of that kind are wholly different from this. Of course, the law will not permit an owner to rent property of a public character where people in large numbers are likely to gather, if he knows, or ought to know, it is unsafe, and then shelter himself behind a lease. There are a number of cases in which the

owners had leased wharves, public halls, piers, or other property of a public nature, and were held liable. Some of them, including Albert's Case, are cited in those we have referred to. The public are deemed to be invited in such cases by the owners, and they cannot receive rent for such uses, and permit their tenants to bring, in large numbers, upon their property, those who do not have the opportunity to inspect the property, unless they have exercised due care to see that it is safe. Such a place in bad condition is, indeed, "a nuisance of the worst character." So with defects and dangerous places in and about public highways, where the public have the right to be. But such cases can have no controlling effect in one such as we have before us, and for the reasons we have given the appellant is not liable.

As this suit is for the loss of the services of the child, which was under the care and control of her father, the equitable plaintiff, who seeks to recover, it is, of course, unnecessary to discuss it from the standpoint of the child. She was only there at the instance of her father, and as he, by reason of his relation to the property as tenant of Bowden, cannot hold the owner responsible for such defect, he cannot recover against her for the death of his child, even if a member of the family of a tenant could sue for injuries sustained when the tenant could not, which has been decided in the negative in Moynihan *v.* Allyn, *supra*, and elsewhere. As we are of the opinion that the plaintiff was not entitled to recover, the prayer, offered at the end of the case, instructing the jury that there is no evidence legally sufficient to entitle the plaintiff to recover, and that their verdict must be for the defendant, should have been granted. It is, therefore, unnecessary to discuss any of the other points raised.

Judgment reversed, without awarding a new trial; the equitable plaintiff (appellee) to pay the costs.

DICKINSON v. WEST END STREET RAILWAY COMPANY.

Supreme Judicial Court, Massachusetts, January, 1901.

RIDING FREE ON STREET CAR — RULES — PASSENGER — FELLOW-SERVANT. — Where plaintiff, an employee of defendant, while riding on one of defendant's cars under a rule permitting its employees when in uniform to ride free at any time, was injured through the motorman's negli-

gence, it was held that at the time of the accident plaintiff did not stand in the relation of a servant to the defendant so as to make him a fellow-servant of the motorman, but was entitled to the rights of a passenger (1).

EXCEPTIONS from Superior Court, Suffolk County.

Action by Charles A. Dickinson against the West End Street-Railway Company. From a judgment in favor of defendant, plaintiff brings exceptions. *Exceptions sustained.*

JOSEPH H. BEALE, JR., and HENRY M. HUTCHINGS, for plaintiff.

P. H. COONEY and A. I. PECKHAM, for defendant.

KNOWLTON, J. — The question in this case is whether the plaintiff was on the defendant's car as a passenger at the time of the accident, or whether he was at that moment in the service of the defendant, in such a sense that the negligent motorman was his fellow-servant. The defendant had made a rule "permitting policemen, firemen, advertising agents, news agents, and employees of the defendant company in uniform, to ride free at any time: such persons being required to ride upon the front platform, so far as practicable." At the time of the accident the plaintiff was riding on the front platform, under this rule, wearing his uniform. Persons riding gratuitously under this rule are passengers, as well as those who pay their fare. Todd *v.* Railroad Co., 3 Allen 18 (2); Doyle *v.* Railroad Co., 162 Mass. 66, 37 N. E. Rep. 770; New World *v.* King, 16 How. 469 (3); State *v.* Western Maryland R. Co., 63 Md. 433. All members of the classes included in the rule stand alike in reference to the duty of care which the defendant owes them, whether they come within one part of the description or another. The rule in reference to employees permits them to ride at any time and place, and for any purpose, if they are in uniform. The reasons in each case for extending this privilege to members of these different classes are not material. Probably they are different in reference to different classes, but they are such as the defendant deems sufficient. So far as employees are concerned, it is enough that, except possibly in regard to wearing uniform, they are given the same rights as others who have no direct connection with the defendant by employment or otherwise. The question, then, is

1. For other actions in which the Question of Relationship of Carrier and Passenger is involved, from the earliest period to 1897, see vols. 2–10 Am. Neg. Cas. Subsequent actions to date are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

2. See Todd *v.* Old Colony, etc., R. R. Co., 7 Allen (Mass.) 207, 9 Am. Neg. Cas. 448, subsequent decision on new trial granted in same case, reported in 3 Allen, 18.

3. New World *v.* King, 16 How. (57 U. S.) 469, is reported in 10 Am. Neg. Cas. 614.

whether at the time of the accident the plaintiff was riding in the full exercise of the rights given by this rule, or whether he was on the car in the performance of his duties as a servant of the defendant, so as to make him at that moment a fellow-servant of the motorman. The bill of exceptions answers this question in its statement, as follows: His work for the defendant "consisted of a certain number of trips at fixed and regular times each day. At the time of the accident he was not on actual duty, but at about noon had finished his work of that morning, got on the first car that came along, and was going home to dinner. That he took no part in the management of this car. That he usually had about three hours, between twelve and three o'clock, during which he was not on actual duty, and his time was his own, and he usually returned home about noon to dinner." The car on which he was riding was not on the line on which he was employed. At the time of the accident he did not stand in the relation of a servant to the defendant. His time was his own, and he owed the defendant no duties until the time arrived for resuming his work. It was no part of his duty to the defendant, as a servant, to take the car on which he was riding and go to a particular place for his dinner. He might go where he pleased and when he pleased during the interval before coming back to his work. This case is different in this particular from cases in which the plaintiff was riding in the line of his duty in the course of his employment. Gillshannon *v.* Railroad Co., 10 Cush. 228; O'Brien *v.* Railroad Co., 138 Mass. 387; McGuirk *v.* Shattuck, 160 Mass. 45, 35 N. E. Rep. 110; Manville *v.* Railroad Co., 11 Ohio St. 417; McNulty *v.* Railroad Co., 182 Pa. St. 479, 38 Atl. Rep. 524. His rights were the same as if, after finishing his day's service, he had taken a car in the evening to visit a friend or to do any business of his own. The fact that he had been in the defendant's service during the day would not make him a fellow-servant with the motorman while riding in the evening under the rule, any more than if he had been a policeman or a newsdealer. The case comes within the decision in Doyle *v.* Railroad Co., 162 Mass. 66, 37 N. E. Rep. 770. For other cases of similar purport, see Baltimore & O. R. Co. *v.* State, 33 Md. 542; State *v.* Western Maryland R. Co., 63 Md. 433; Baird *v.* Pettit, 70 Pa. St. 477–483; McNulty *v.* Railroad Co., 182 Pa. St. 479, 38 Atl. Rep. 524; Packet Co. *v.* McCue, 17 Wall. 508; Morier *v.* Railway Co., 31 Minn. 351, 17 N. W. Rep. 952; Manville *v.* Railroad Co., 11 Ohio St. 417.

Exceptions sustained.

MATHER v. LOWELL, LAWRENCE AND HAVERHILL STREET RAILWAY.

Supreme Judicial Court, Massachusetts, January, 1901.

PEDESTRIAN STRUCK BY STREET CAR WHILE CROSSING STREET — CONTRIBUTORY NEGLIGENCE. — Where plaintiff's intestate, a woman, was struck by defendant's street car as she was attempting to cross the street on a clear, bright winter morning, the street being covered with snow, and it appeared that the gong of the car was sounded, that deceased saw the car, which was approaching at its ordinary rate of speed of fifteen to eighteen miles an hour and was in plain sight when she started from the crossing, and was struck by the car a few feet west of the crosswalk, having run diagonally as though to get around the car, it was proper to order verdict for defendant on the ground of contributory negligence of the plaintiff's intestate (1).

EXCEPTIONS from Superior Court, Essex County.

Action by Bernard W. Mathes, administrator of Lizzie A. Mathes, deceased, against the Lowell, Lawrence and Haverhill Street Railway. To verdict ordered for defendant, plaintiff excepts. *Exceptions overruled.*

W. S. PETERS and H. J. COLE, for plaintiff.

J. P. SWEENEY and H. R. DOW, for defendant.

BARKER, J. — The verdict for the defendant was ordered rightly, because there was no evidence from which it could be found that the plaintiff's intestate was in the exercise of ordinary care. A foot-traveler whose course is across the tracks of a street railway must exercise care to avoid being hurt by the cars, and, if he is struck by a car and injured or killed, there can be no recovery, in a suit against the railway company for damages, unless the plaintiff shows by affirmative evidence that the traveler was in the exercise of due diligence to avoid injury. And, further, when the whole evidence has no tendency to show care on the part of the traveler, but, on the contrary, shows that he was careless, it is the duty of the court to direct a verdict for the defendant. Creamer *v.* Railway Co., 156 Mass. 320, 31 N. E. Rep. 391, and cases cited (2). See also

1. For other actions arising out of Accidents to Pedestrians at Street Crossings, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

2. There is a note of Creamer *v.* West End Street R'y Co., 156 Mass. 320, in 9 Am. Neg. Cas. 448.

Benjamin *v.* Railway Co., 160 Mass. 3, 35 N. E. Rep. 95; Robbins *v.* Railway Co., 165 Mass. 37, 42 N. E. Rep. 334; Kelley *v.* Railway Co., 175 Mass. 333, 56 N. E. Rep 285 (7 Am. Neg. Rep. 314 n). The evidence tended to show that the plaintiff's intestate, a woman, was struck by the car as she was attempting to cross the street, in the center of which was the car track. The width of the street between the sidewalks was forty feet, and that of the track four feet eight and one-half inches. In attempting to cross the street the deceased was walking from the northerly curbstone towards the south; the street running east and west, and the car going from east to west. From the northerly curb to the northerly rail of the track the distance was seventeen and one-half feet. The accident happened in the forenoon of a clear, bright winter morning. A few days before there had been a heavy fall of snow, and the surface of the street was covered with snow. It had been removed partially from the part of the street northerly of the car track, but was still very deep, and lay in piles close to the track upon its southerly side; and on each side of the track the surface of the snow was above the rails, and slanting away from each rail. Another street joined the one in which was the car track at right angles, from the north; and a crosswalk of flagstones led from the sidewalk at the easterly corner made by the joining of these two streets across the street in which was the track. Five of the witnesses called testified that they saw the accident. Of these witnesses, two did not see the deceased until she was in collision with the car, or nearly so, but each of the other three testified to seeing her upon the sidewalk at the corner of the two streets. The first of these witnesses, after seeing the deceased upon the sidewalk at the corner, next saw her under the car. The next witness, a school girl of fifteen, testified that she saw the deceased standing on the corner looking up the street, towards the car; the attention of the witness being called to the deceased by the gong of the car. She also testified that when she first saw the deceased the latter was on the crossing, just off the curbstone, and that when the deceased started from the sidewalk she ran diagonally across the street, and was two or three feet west of the crosswalk when the car struck her, and that she ran diagonally as though to get around the car. The third witness testified that he saw the deceased when she stood on the crossing, and that he saw her start to walk across the street, and that she was struck when very near the center of the track; that he did not think she was running, but she walked very fast, and when she left the curbstone was walking at a very brisk pace. The fourth witness did not see the deceased before she reached the crossing, or as she

came on the track, but heard the gong on the car struck very rapidly, and looked round, and saw the car strike the deceased just as the witness looked round. The attention of the fifth witness was first attracted by hearing the gong, and the next thing this witness saw was the deceased swaying back and forth, when the car struck her, as though she was trying to get off the track one way or the other, and was doubtful whether she should go forward or back. Upon the evidence the approaching car was in plain sight from the corner where the deceased left the sidewalk to cross the street. It was approaching at the rate of from fifteen to eighteen miles an hour, which was its ordinary rate of speed; and, although one of the witnesses testified that he did not remember hearing the gong, there can be no contention that it was not sounded. One reasonable inference from the evidence is that the deceased left a place of safety upon the sidewalk in order to hurry across the street before the car should reach the crossing, and knowing that it would be necessary to hurry if she expected to avoid being struck by the car. But, even if this is not the only reasonable conclusion, there is on the evidence no ground for an inference that the deceased exercised care to avoid danger. As such care could not be found, the verdict for defendant was ordered rightly.

Exceptions overruled.

INHABITANTS OF TOWN OF ROCKPORT v. ROCKPORT GRANITE COMPANY.

Supreme Judicial Court, Massachusetts, January, 1901.

LICENSEE — TENANT. — A person who has merely the privilege of quarrying rock and carrying on work on the land of the licensor, the quarry owner, payments being made to the quarry owner by way of stumpage, and not by way of rent, is a licensee and not a tenant.

ERECTION OF NUISANCE BY LICENSEE ON HIGHWAY — LIABILITY OF LANDOWNER FOR INJURY TO PERSONS. — Where a licensee, quarrying rock on land of the licensor, erects a derrick with the guy stretched across the highway so low as to be dangerous to persons driving over the way, the same is a nuisance, and where the owner of the land suffers such nuisance to remain he is liable to anyone injured thereby (1).

1. For other actions relating to Liability of Landowner for Injury to Persons Caused by Erection of Nuisance by Licensee, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

EXCEPTIONS from Superior Court, Essex County.

Action by the Inhabitants of the town of Rockport against the Rockport Granite Company. From verdict for plaintiff, defendant brings exceptions. *Overruled.*

FREDERICK H. TARR, for plaintiff.

JOHN M. CHURCHILL and JOSEPH R. CHURCHILL, for defendant.

LORING, J. — In this case there was a mistrial, but we think that the plaintiff is entitled to keep his verdict. The jury were told that to charge the defendant they must be satisfied that the defendant kept control of all work done by its "motion" men, or that, when Hill began to work as a "motion" man on the land in question, the use of a derrick, as it was then erected, was contemplated by the defendant and by Hill. The jury were further told that, if they did not find one of these two facts, their verdict must be for the defendant. The jury should have been told that the guy of the derrick was a nuisance, and that the defendant was liable if it allowed the derrick, with the guy as it was set up, to be maintained on its land, even though it had been set up by Littleback before the defendant became the owner of the land; at any rate if the fact that it was stretched across the highway as it was was known to the defendant. A "motion" man is a licensee carrying on work on his own account on the land of the licensor, the quarry owner. He is not a tenant. He has no right of possession in the land worked by him, but merely the privilege of quarrying rock on it, and working up the rock into marketable shape, — in the case at bar into paving blocks. The payments made by him to the quarry owner are by way of "stumpage," in this case, $2 for every 1,000 of paving blocks, — and not a payment by way of rent. The quarry owner in such a case is no more liable for injuries caused by the "motion" man and his servants than he would be in case the work of quarrying the rock and working it up into paving blocks had been done by an independent contractor. Indeed, his liability is not so extensive; for, in case of work done by a licensee, the work done is done on the licensee's own account, as his own business, and the profit of it is his. It is not a case, therefore, where the thing which caused the accident is a thing contracted for by the owner of the land, and for which he may be liable for that reason, even when done by an independent contractor, because it is a thing dangerous in itself, or because the doing of it involves a duty to others, or because it is itself a nuisance. Wetherbee *v.* Partridge, 175 Mass. 185, 55 N. E. Rep. 894; Robbins *v.* Chicago, 4 Wall. 679; Black *v.* Finance Co. (1894), App. Cas. 48; Pickard *v.* Smith, 10 C. B. (N. S.) 470; Hardaker *v.* District Council (1896), 1 Q. B. Div. 335;

Angus *v.* Dalton, 4 Q. B. Div. 184, 6 App. Cas. 829; White *v.* Jameson, L. R. 18 Eq. 303. Even more the erection of a derrick is such an act that, if it had been done by an independent contractor, and a traveler on the highway had been injured by the negligence of the contractor's servants in erecting it, the landowner would not have been liable. Such an act is a mere transitory act done in the progress of the work, and is what has been described, for want of a better term, as "a casual act of wrong or negligence," and as "collateral negligence." Pickard *v.* Smith, 10 C. B. (N. S.) 470; Angus *v.* Dalton, 4 Q. B. Div. 184, 6 App. Cas. 829; Hardaker *v.* District Council (1896), 1 Q. B. Div. 335; Robbins *v.* Chicago, 4 Wall. 679. But the result of Littleback's erecting the derrick as he did erect it, with the guy stretched across the highway so low as to be dangerous to persons driving over the way, was the erection of a nuisance on the defendant's land. We have no doubt that an owner is bound to see to it that his land is so managed by persons brought onto it by him as not to cause injury to others; and that if a structure is erected on his land by a licensee, which is in fact a nuisance, and he suffers it to remain there, he is liable to any one injured thereby, at any rate when he knows of the existence of the thing which constitutes the nuisance. That there might be such a duty on the owner of land was suggested by LITTLEDALE, J., in Laugher *v.* Pointer, 5 Barn. & C. 547, 560, a case which had to do with personal property, but in which the whole subject was discussed; and that suggestion has since been quoted with approval. See Parke, B., in Quarman *v.* Burnett, 6 Mees. & W. 499, and in Rapson *v.* Cubitt, 9 Mees. & W. 710, 714; Creswell, J., in Rich *v.* Basterfield, 4 C. B. 783; Rolfe, B., in Reedie *v.* Railroad Co., 4 Exch. 244; Jessel, M. R., in White *v.* Jameson, L. R. 18 Eq. 303, 305. This principle was enforced in White *v.* Jameson, L. R. 18 Eq. 303; Chibnall *v.* Paul, 29 Weekly Rep. 536; Attorney-General *v.* Stone, 12 Times Law Rep. 76. And see Thomas, J., in Hilliard *v.* Richardson, 3 Gray, 349, 366. Compare Tarry *v.* Ashton, 1 Q. B. Div. 314, as to the necessity of knowledge on the part of the landowner (1). Though the defendant had no control over the

1. The facts and points decided in the English cases cited in the case at bar are as follows:

In Black *v.* Christ Church Finance Co., L. R. App. Cas. 48 (1894), the defendant company was held liable in damages for the act of its contractor in negligently and improperly lighting a fire on its land and permitting it to spread to the plaintiff's lands, even though such contractor in so doing disregarded special stipulations contained in such contract relative to the time at which such fire should be lit.

In Pickard *v.* Smith, 10 C. B. N. S. 470, it appeared that refreshment rooms and a coal cellar at a railway station were let by the company to S., the

manner in which the work was done on its land by "motion" men, yet, if a nuisance was erected on it by a "motion" man, it was not only its right, but its duty, to see that the nuisance was abated.

We assume that proper instructions were given to the jury on the preliminary question of the defendant's liability in case the jury found that Lucas had, earlier in the day, knocked the guy rope out of the prop which held it up above the highway, and that the instructions which are under discussion here were given only in case the

opening for putting the coals into the cellar being on the arrival platform. A train coming in while the servants of a coal merchant were shooting coals into the cellar for S., a passenger, whilst passing in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded. *Held*, that S., the occupier of the refreshment rooms and cellar, was responsible for this negligence.

In Hardaker *v.* Idle District Council, 1 Q. B. Div. 335, (1896), it appeared that the defendant, under statutory authority, employed a contractor to construct a sewer for it. In consequence of his negligence in carrying out the work, a gas main was broken, and the gas escaped from it into the house in which the plaintiffs (a husband and wife), resided, and an explosion took place, by which the wife was injured in her person, and the husband in his property. The defendant was held liable, on the ground that it owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas main, and that this duty could not be delegated to another, so as to relieve it from liability for negligence.

In Dalton *v.* Angus, L. R. 6 App. Cas. 740 (1881), it appeared that after two adjoining dwelling-houses had remained each on the extremity of its owner's soil for more than twenty years, one was converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more pressure upon the soil under the adjoining house. The conversion was made openly and without concealment. More than twenty years after the conversion the owners of the other house employed a contractor to pull it down and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. During the excavation plaintiff's factory, being deprived of the lateral support, fell down. *Held*, that the owners as well as the contractor were liable. See also same case, Angus *v.* Dalton, 4 Q. B. Div. 184, 6 App. Cas. 829.

In White *v.* Jameson, L. R. 18 Eq. 303, 22 W. R. 761, it was held that if the lessee of property, proceeding by the license of the lessor, performs acts which amount to a nuisance, and for which he would have no defense in an action, the lessor will be liable, for he is bound to see that his property is so managed that other persons are not injured. Where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant to a suit to restrain the nuisance.

In Laugher *v.* Pointer, 5 Barn. & C. 547, where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to plaintiff, it was held by ABBOTT, Ch. J., and LITTLEDALE, J., that the owner of the carriage

jury found in favor of the plaintiff on that preliminary question of fact. The whole charge is not set forth in the bill of exceptions, and no question has been raised by the defendant on this point, on which the evidence was conflicting. Under the instructions upon which the case was submitted to them, the jury must have found either that work done by "motion" men is done under the control of the owner of the quarry, or that the defendant in this case knew of the existence of the derrick, erected as it was erected; for they

was not liable to be sued for such injury. BAYLEY and HOLROYD, JJ., dissented.

The facts in Quarman *v.* Burnett, 6 M. & W. 499, were as follows: A party who had a carriage of his own had been in the habit of hiring horses and a servant from a particular job master, and was in the habit of paying the servant a fixed sum for each drive, and had provided him with a livery to wear while driving. The servant, on returning from a drive, went into the house of the hirer to change his livery, leaving the horses without any one to mind them, which accordingly ran off and injured a carriage of another person. *Held*, that these facts did not constitute him the servant of the hirer of the horses, so as to render the latter liable for injury done by them to the carriage of a third party.

In such case it was ruled that a person who drives in his own carriage with job horses, and a driver hired to accompany them, is not liable for any injury caused to a third party by negligent driving or carelessness of the person so hired, even although he has selected that person from among the servants usually employed by the job master for that purpose. A person hiring job horses and a driver, may, however, in such case render himself liable by his own conduct, such as directing the servant to drive in a particular manner, which caused the injury, but this is not in respect of the general relation of master and servant.

In Rapson *v.* Cubitt, 9 M. & W. 710, Car. & M. 64, 6 Jur. 606, it appeared that a builder was employed by a committee of a club to execute alterations at the club-house, including the preparation and fixing of gasfittings. He made a subcontract with B., a gasfitter, to execute this part of the work. In the course of doing it, through B.'s negligence, the gas exploded, and injured the plaintiff. *Held*, that the builder was not liable for this injury. In such action it was also *held*, that although a plaintiff through the negligence of the defendant, is disabled for life from performing the duties of the office to which he has been accustomed, yet the measure of his damages is by no means to be taken from the amount of an annuity which would replace the annual salary of the plaintiff; for *non constat* that he would have retained his situation for life.

In Rich *v.* Basterfield, 4 C. B. 783, 11 Jur. 696, 16 L. J. C. P. 273, 2 C. & K. 257, it appeared that A., the owner of a house, with a fireplace and a chimney, demised it to a tenant from week to week. The tenant lighted fires, and from the position of the chimney, the emission of the smoke was a nuisance to B., the occupier of the adjoining house. More than one week elapsed during which this nuisance continued, and A. did not determine the tenancy. B. brought an action against A. for causing and continuing this nuisance, to which A. pleaded not guilty and not possessed: *Held*, that, on both issues, A. was entitled to the verdict. *Held*, also, that the entering of smoke discharged from the defendant's chimneys into the plaintiff's house amounted, in contemplation of law, to a nuisance;

were instructed that, unless they found that the work of "motion" men was done under the control of the owner of the quarry, they must find, to charge the defendant in this case, that the defendant contemplated that Hill would use the derrick as it was used by him when he began to work as a "motion" man. That includes a finding that the defendant knew of the existence of the derrick. The defendant cannot complain that the jury were told that they might hold the defendant liable on the ground that the work done by

but the fact of all buildings erected in the locality on which the defendants were, being declared common nuisances by statute, was not, *per se*, sufficient to entitle the plaintiff to a verdict in an action in which the nuisance complained of arose from the smoke.

In Rich *v.* Basterfield, *supra*, it was *held*, that although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession. The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession. If the owner of land demises it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term; so, if he is a party to the creation of a nuisance after the demise; but he is not responsible for a nuisance so created, though such nuisance is a probable consequence of the use of the land as demised. An omission on the part of the owner of land to determine the tenancy after the creation by the tenant of a continuing nuisance thereon, is not equivalent to a fresh demise of the premises, so as to make him responsible for such nuisance.

In Reedie *v.* London & N. W. R'y Co., 4 Exch. 244, a railway company contracted, under seal, with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetency. The workmen in constructing a bridge over a public highway negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. *Held*, that the company was not liable, and that in such case the terms of the contract in question did not make any difference.

In such action it was held that in an action for negligence there is no distinction between injuries arising from the careless and unskilful management of an animal or other personal chattel, and an injury resulting from the negligent management of fixed real property, unless perhaps where the act complained of is such as to amount to a nuisance.

In Chibnall *v.* Paul, 29 W. R. 536, it appeared that an owner of a public house erected an urinal in a private passage leading out of the street, and inclosed it between doors which he kept locked every night. There was a space between the line of area railings in the street and the urinal door nearest to the street, which space he cut off from the street with an iron gate placed flush with the line of the railings. This gate was never locked. It being proved that persons habitually used the space between the door and the gate in such a manner as to cause to the neighbors a nuisance, which he took no steps to prevent: *Held*, that he was responsible for such user, it being a probable consequence of the manner in which he had arranged the premises.

In Tarry *v.* Ashton, L. R. 1 Q. B. D. 314 (1876), it appeared that A. occupied

"motion" men is done under the landowner's control. There was no evidence on which such a finding could be made. But the defendant cannot complain of that. No objection was taken by it to that part of the charge.

Exceptions overruled.

SHIPLEY v. PROCTOR ET UX.

Supreme Judicial Court, Massachusetts, January, 1901.

FALLING ON ICE FORMED ON SIDEWALK FROM WATER RUNNING FROM BUILDING — PUBLIC NUISANCE — QUESTION FOR JURY. — In an action to recover damages for injuries sustained by falling on ice on the sidewalk in front of defendant's building, which was formed by water coming from melting snow on the roof of the building, the question whether the ice thus formed was a public nuisance was properly left to the jury.

LIABILITY FOR INJURY CAUSED BY ICE ON HIGHWAY — INSTRUCTION — STATUTE. — A request to instruct as to non-liability for any injury received on a highway by reason of ice and snow thereon, if such highway was otherwise reasonably safe for travelers, such request being founded upon Stat. 1896, c. 540, was properly refused, as that statute is part of the law as to the liability of municipalities, and applies only to that liability.

FALLING ON ICE ON SIDEWALK — REASONABLE CARE — EVIDENCE. — Where plaintiff was injured by falling on ice on the sidewalk in front of defendant's building, and evidence as to condition of sidewalk was conflicting, the plaintiff testifying that as she approached the walk in front of defendant's premises she was walking slowly and cautiously; that she saw a sheet of ice on the sidewalk; that she stepped on the ice and commenced to walk over it; that while so walking she looked into the window of a store and then looked straight ahead up the street, not paying any more attention to the ice; it was held that upon the whole evidence reasonable care could be found.

EXCEPTIONS from Superior Court, Middlesex County.

Action by Mary F. Shipley against Seward N. Proctor and wife. From a judgment in favor of plaintiff, defendants bring exceptions. *Overruled.*

a house abutting on a street, and that projecting from the front wall, about fifteen feet over the pavement, was a lamp which he had employed a contractor to repair, along with his other lamps. The contractor did his work badly, and another contractor being afterwards employed by A. to examine the lamp, placed the ladder against the bracket which joined it to the wall, and the weight of the ladder and the rotten state of the bracket caused the lamp to fall and injure a passer-by in the street. *Held*, that A. was liable for the injury so caused.

"The action was brought to recover for injuries sustained by a fall on ice on the sidewalk in front of defendant's building, which ice was formed by water coming from melting snow on the roof of the building, and discharged on the sidewalk by leaders from the roof. The evidence was conflicting as to how much of the sidewalk was covered with ice, and as to the size of the patches. At the close of the evidence the court refused defendant's request to instruct the jury as follows: 'A public nuisance is any obstruction or defect in a highway which makes it unsafe and inconvenient for travelers using due care, but a highway shall not be deemed unsafe and inconvenient for travelers using due care solely by reason of ice and snow thereon, if it would be reasonably safe and convenient for travelers but for the presence of ice and snow thereon; and the defendants, by building and maintaining a conductor of such kind that it discharged water upon the sidewalk, which afterwards froze and formed ice, did not create or maintain a public nuisance.' The following instruction was also asked in case the former was refused, and was also denied: 'A public nuisance is any obstruction or defect in a highway which makes it unsafe and inconvenient for travelers using due care, but a highway shall not be deemed unsafe or inconvenient for travelers using due care merely because it is slippery, if it would otherwise be reasonably safe and convenient for travelers using due care; and the defendants, by building and maintaining a conductor of such kind on their building that it discharged water upon the sidewalk, which afterwards froze and formed ice, are not liable, as for a public nuisance, if the ice so formed was smooth, and not in ridges."

JOHN J. & WM. A. HOGAN, for plaintiff.

WM. H. ANDERSON, JAMES J. KERWIN and BURKE & CORBETT, for defendant.

BARKER, J. — The evidence tended to show that the conductors attached to the defendant's building were so arranged that the water from them formed ridges of ice upon the sidewalk. Whether the result was a public nuisance in the highway adjoining the defendant's premises was a question of fact. Kirby *v.* Association, 14 Gray, 252. This question was left to the jury under instructions to which no exception was taken. The request founded upon St. 1896, ch. 540, was properly refused. That statute is part of the law as to the liability of municipalities, and applies only to that liability.

The only contention made in the argument before this court was that a verdict should have been ordered for the defendant because the evidence would not justify a finding that the plaintiff was in the exercise of due care. But the evidence both as to the condition of

the sidewalk where the plaintiff fell and of the sidewalks generally was conflicting, and it might be found that in walking in front of the building there was no occasion for the plaintiff to exercise extraordinary care. She testified that as she approached the walk in front of the premises she was walking slowly and cautiously until she got about in front of the unoccupied store in the defendant's building, and that she saw a sheet of ice upon the sidewalk, that she stepped upon the ice and commenced to walk over it, and that about the time that she began to walk over the ice she looked into the window of the unoccupied store, continuing to walk, and then turned her gaze from the window and looked straight ahead up the street, not looking down to see the ice or to pay any more attention to it. In Wilson *v.* City of Charlestown, 8 Allen, 137, chiefly relied on for the defendant, the whole sidewalk was covered with ice, so as to be very slippery and dangerous, and the plaintiff had just passed over it, and had remarked upon its dangerous condition, and might have taken a safer way. These circumstances distinguish it from the present case. Upon the whole evidence, reasonable care could be found, and the question of the plaintiff's care was left to the jury under instructions not excepted to.

Exceptions overruled.

SILVIA v. SAGAMORE MANUFACTURING COMPANY.

Supreme Judicial Court, Massachusetts, January, 1901.

EMPLOYEE INJURED BY MACHINERY — OBVIOUS DANGER — CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK.—Where plaintiff, a boy of ordinary intelligence over fourteen years of age, employed as a tuber in defendant's factory, was injured by having his fingers caught in the gearing of one of the mules on which he was working, and it appeared that he had been working on the mules for two months before the accident, the gearing of which was always in plain sight, there being twenty-eight mules in the room, and on each of which plaintiff had regularly assisted in tubing three times a day, it was held that direction of verdict for defendant was proper, there being no evidence that the accident was caused by failure of defendant to perform a legal duty, the same being caused by plaintiff's negligence or by an obvious risk of the business which he assumed when he entered the defendant's service (1).

1. *Employees injured — Assumption of risk.* — In BARRY *v.* NEW YORK BISCUIT CO. *(Massachusetts, January, 1901)*, 59 N. E. Rep. 75, defendant's exceptions to verdict for plaintiff, who was injured while operating a freight elevator in

REPORT from Superior Court, Bristol County.

Action for injuries by one Silvia, by his next friend, against the Sagamore Manufacturing Company for personal injuries. A verdict ordered in the Superior Court for defendant was reported to the Supreme Court. *Judgment on verdict.*

J. W. CUMMINGS and EDWARD HIGGINSON, for plaintiff.

JAMES F. JACKSON and RICHARD P. BORDEN, for defendant.

KNOWLTON, J. — The plaintiff, a boy of ordinary intelligence, over fourteen years of age, was employed as a tuber in the mule room of the defendant's factory. He was injured by having his fingers caught between the quadrant gear and the pinion gear of one of the mules. The plaintiff contends that the defendant was negligent in not warning him of the danger of getting his fingers caught in the gearing, and that this negligence caused the accident.

The evidence shows that the greater part of this gearing was always in plain sight when the mule moved in and out and when it was at rest, although its position changed with the movement of the mule, leaving the whole exposed some of the time, and some of the time only a part. The plaintiff had been working on these mules for two months before the accident. There were twenty-eight mules in the room, and he had regularly assisted in tubing each one of them three times a day during the whole two months. The defendant properly might assume that he did not need to be told that, if

defendant's factory, were sustained. In sustaining the exceptions BARKER, J., said: "In our opinion, a verdict should have been ordered for the defendant upon the ground that, even if the plaintiff did not in fact appreciate the danger of using the elevator in the condition in which it was, and located and loaded as it was, at the time of the accident, the danger was so obvious that he must be held to have been negligent in incurring the risk, or to have known and assumed it. The danger was that the jerking of the elevator, which he knew would cause loose boxes placed by himself upon the elevator floor in piles six feet or more high to be so moved and shaken in the ascent of the elevator as to be caught under the projecting beam, the place of which he also knew. The plaintiff was twenty-three years of age. He had run the elevator many times a day for some sixty working days before the time of the accident. The jerking and shifting of the elevator was not new to him or unexpected, and its tendency to shift the position of the boxes so as to place them where they would be caught by the beam was so obvious that he should have appreciated it; and if he did not in fact both appreciate it and use means to prevent such an occurrence, he was not in the exercise of ordinary care. If his own testimony was true, he carelessly failed to appreciate the risk, and this carelessness caused him to so place the boxes that it was obvious that they were in danger of being so moved by the jerking of the elevator as to be caught under the beam, and to take no other means to keep them in a safe position, which was negligence on his part. If he did appreciate the risk, there is no question but that he assumed it.

he put his fingers in this gearing, they would be crushed. The mule was always stopped while the tubing was going on, so that apparently there was no danger in putting on the tubes. According to the plaintiff's testimony, tubers did not attempt to piece the broken threads when they began to work at tubing, but were permitted to assist in that work only when they had learned after a time by seeing others do it. There is nothing to indicate that in the work of tubing, apart from piecing, there was any danger of getting caught in the gearing, such as to call for warning from the employer. The plaintiff testified that at the time of the accident he had learned how to piece. There is no evidence to warrant a finding that an employer would believe, or have reason to believe, that such a boy would remain ignorant of the existence of the gears and of the danger from them, after working a considerable time on the mules as a tuber, so that he would need to be warned of them when beginning to assist in piecing the broken threads. It is hardly possible that the accident was caused by the plaintiff's ignorance of the existence of the gears, and of the danger to one who should get his fingers caught in them. If it is conceivable that he could have worked there two months, passing his hands over twenty-eight mules, in close proximity to the gearing, three times a day, without knowing of these gears, it is only upon the theory that he was grossly careless. There was no evidence to warrant a finding that the accident

In the opinion of a majority of the court, there should be judgment for the defendant in accordance with the agreement made at the trial in the Superior Court. Exceptions sustained. Judgment for defendant in accordance with the agreement."

In O'BRIEN *v.* NUTE-HALLETT CO. *(Massachusetts, January, 1901)*, 59 N. E. Rep. 65, defendant's exceptions to judgment for plaintiff were overruled. It appeared that the superintendent of defendant and plaintiff went to examine a bin in a brewery, to which defendant was delivering grain, to see if it was empty, but it was so dark inside the bin they could not see the floor. The superintendent told plaintiff to come away, that it was all right, and in a few minutes ordered plaintiff to get into the bin to empty sacks of grain. Plaintiff jumped over the side of the bin, and was injured by falling on a joist, from the fact that the bin had no floor in it. In overruling the exceptions, BARKER, J., said: "The court below was right in refusing to order a verdict for the defendant. The assurance of the superintendent that the bin was all right when he and the plaintiff were examining the bin, coupled with the order to come away from it, and the subsequent order for the plaintiff to get into the bin, justified a finding that the plaintiff was in the exercise of due care, and that the superintendent was negligent in ordering the plaintiff into the bin. The contention that the plaintiff could not avail himself of the superintendent's statement that the bin was all right, because it was not alleged in the declaration, is not shown to have been made at the trial, and is not open. Exceptions overruled."

was caused by the failure of the defendant to perform a legal duty. Rooney *v.* Cordage Co., 161 Mass. 153–160, 36 N. E. Rep. 789; Cheney *v.* Middlesex Co., 161 Mass. 296, 37 N. E. Rep. 175; Ciriack *v.* Woolen Co., 151 Mass. 152, 23 N. E. Rep. 829; O'Connor *v.* Whittall, 169 Mass. 563, 48 N. E. Rep. 844; Stuart *v.* Railway Co., 163 Mass. 391, 40 N. E. Rep. 180. The only theory supported by the evidence is that it was caused by the plaintiff's negligence, or by an obvious risk of the business, which he assumed when he entered the defendant's service.

Judgment on the verdict.

MILLER v. CITY OF SPRINGFIELD.

Supreme Judicial Court, Massachusetts, January, 1901.

PERSON DRIVING INJURED BY DEFECT IN STREET — NOTICE OF DEFECT — INSUFFICIENCY OF NOTICE. — In an action to recover damages for injuries sustained by plaintiff being thrown out of his wagon by reason of his horse running away because of the wagon catching in an alleged defect in the street, it was held that a notice to the city not indicating any place as defective except that where the injury occurred was insufficient, the defect which was the cause of the injury not being there, but 300 yards distant therefrom.

NOTICE — STATUTE. — Where plaintiff failed to meet the statutory requirements as to notice of cause of injury, the insufficiency of such notice was held not to be fatal to plaintiff in another trial, provided he brought himself within the proviso contained in Stat. 1888, c. 114.

EXCEPTIONS from Superior Court, Hampshire County.

Action by one Miller against the City of Springfield to recover for personal injuries alleged to have been occasioned by a defective street. From a judgment for plaintiff, defendant brings exceptions. *Exceptions sustained.*

S. S. TAFT and STEELE & HARDY, for plaintiff.

E. H. LATHROP, for defendant.

HAMMOND, J. — The plaintiff testified that he was driving on Dwight street, in the defendant city, near East Court street, when the wheels of his wagon got into the street-car tracks, and "the wagon switched around quite a little;" that he tried to get out of the rut; that he "yanked" his horse "around * * * one way, and then the other;" that he did not get out of the tracks; that when he "yanked" the horse it seemed "as though the breeching or something broke, and that let the wagon up onto" the heels of the horse, and that then the horse "kicked and ran, * * * as though he was mad," up Dwight street to the corner of Lyman

street, where the plaintiff was thrown from the wagon and injured. The distance from the place where the harness broke to the place where the plaintiff was thrown out was about 300 yards. The whole of Dwight street was paved with brick, both outside and inside the rails of the street-car track, and the plaintiff contended at the trial that the street was defective "by reason of the way the bricks were laid up to the inside of the rails, making * * * a trough, or 'too abrupt a slope,' in which the wheel of the plaintiff's wagon was caught." The notice described the place of the injury as on Dwight street, near the intersection of Lyman street, and about twenty-five feet therefrom, and the defect as the "faulty construction of the paving in and around the rails of the" street-railway track. At the close of the evidence, the defendant, evidently insisting that the notice was inaccurate in its statement of the place and cause of the injury, asked the court to rule that, "if the defendant was led to believe by the notice, and did believe, that the alleged defect which caused the accident was 'about twenty-five feet from Lyman street,' then the plaintiff cannot recover." The court declined so to rule, but ruled that the question whether or not the defendant was misled became material only in case the notice was insufficient, and submitted the question of the sufficiency of the notice to the jury under instructions which authorized them to find for the plaintiff if they thought the notice was sufficient. To the refusal to give the instruction requested, and to the ruling submitting to the jury the question of the sufficiency of the notice, the defendant excepted.

We think that the notice was insufficient, and that the jury should have been so instructed. The plain purpose of the statute is that the city shall have notice of the defect which causes the injury, so that it may understand what the plaintiff claims in that respect, and may have a seasonable opportunity to investigate as to its liability. Ordinarily, the place of the injury is substantially identical with the place of the defect; and, when that is the case, a description of the nature of the defect, joined with a statement of the place of the injury, is a sufficient description of the cause of the injury. The object of the statutory notice, so far as respects the cause of the injury, is attained when it enables the city to find with reasonable certainty the locality and nature of the alleged defect. But when the alleged defect is of the character complained of in this case, and the place of the injury is 300 yards from the alleged defective spot in the street, it is manifest that a statement as to the place of the injury gives no indication whatever as to the real cause of the injury, for it fails to point out the defect with which the wagon came in contact. The notice in this case does not indicate any

place as defective except that where the injury occurred, namely, on Dwight street, "near the intersection of Lyman street, and about twenty-five feet from said Lyman street." The defect which was the cause of the injury was not there, but 300 yards distant therefrom, and it was of that defect that the city should have had notice. It was not sufficient that the existence of a similar defect elsewhere should be stated. Such a notice would not aid the city in investigating the question of its liability. The plaintiff, however, contends, and there was evidence tending to show, that the same defect existed the whole length of Dwight street, from East Court street to Lyman street. If this was so, then a mere description of the nature of the defect would be too indefinite in a case like this to inform the city of its locality, and would fail to meet the purpose of the notice. And especially would this be so where, as in this case, the only locality stated in the notice is 300 yards distant from the cause of the injury. Norwood *v.* City of Somerville, 159 Mass. 105, 33 N. E. Rep. 1108. The cause of the injury was not to be found in the defective condition near Lyman street, but in that near East Court street. This was the defect with which the wagon came in contact, which was the cause of the injury, and of the locality of which the notice should have given information. Of the locality of this defect the notice gave no sufficient information, and, therefore, failed to meet the statutory requirements as to the cause of the injury. The insufficiency of the notice is not such as to be fatal to the plaintiff in another trial, however, provided he bring himself within the proviso contained in St. 1888, ch. 114.

Exceptions sustained.

KING v. COLON TOWNSHIP.

Supreme Court, Michigan, January, 1901.

CHILD STEPPING INTO HOLE IN HIGHWAY — CONTRIBUTORY NEGLIGENCE. — Where plaintiff, a girl fourteen years old, was injured on her way home from school by stepping into a hole on the highway, which she had passed twice a day for some time before the accident, and it appeared that she had walked around it every time she passed it; that she fell into it in broad daylight; that there was nothing to hinder her from seeing it, and that if she had been looking down she would have seen it: *Held*, that she was guilty of contributory negligence precluding recovery, and judgment for plaintiff reversed (1).

1. *Pedestrian injured on sidewalk — Contributory negligence* — In KOPELKA *v.* CITY OF BAY CITY *(Michigan, January, 1901)*, 84 N. W. Rep. 1106, judgment for plaintiff was affirmed, the question of contributory negligence

ERROR to Circuit Court, Kalamazoo County.

Action by Mary King, by David King, her next friend, against the township of Colon. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

"On June 1, 1899, plaintiff, then fourteen years of age, on her way home from school stepped into a hole in the public highway, by reason of which she claims to have received injury. Nearly five years afterwards she instituted this suit, through her father, to

being for the jury to determine from the following facts: "Plaintiff left his home at half-past nine o'clock on November 29, 1899, to go to a grocery near by to buy some tobacco, stepped into a hole in the sidewalk about twelve inches long by six or eight inches wide, fell, and fractured his ankle. Plaintiff worked in a lumber yard near by, and had for several years walked over this sidewalk to and from his home every day. It was in bad condition. The negligence of defendant is conceded, unless it was under no obligation to look after the walk. The sole defense is, assuming the defendant is liable for the condition of the walk, that the plaintiff knew of its condition, and that it was so bad that he had no right to walk over it, but should have walked in the street, or passed over to the sidewalk on the other side. The city employed two men in every ward to look after the sidewalks, but they had not reported or repaired this one. Policemen were also required to notify them of all holes throughout the city, but no notice of this hole had been given. Mr. Orr, the city attorney, was called as a witness by the plaintiff. He went to see the sidewalk the second day after the accident. He described its condition as follows: 'The hole, I think, was between the fourth and fifth boards. There were no boards broken. There were three stringers under the sidewalk. The sidewalk was from two and a half to three inches from the ground at the bottom of the planks, by measurement. The highest that the sidewalk was above the ground was three inches. Some places it almost touched the ground. I will further say, at the time I noticed the electric light. There were no leaves on the trees at all. The electric light was about three hundred feet south of there. Standing on the end of the sidewalk, and stopping down so you could look at the light, the light would shine squarely just past the first tree on the corner, and right down on the sidewalk. Q. How large was this hole in the walk? A. The hole, I should judge, was perhaps six or eight inches, maybe eight inches wide at the widest part, and, I should judge, not more than a foot long. Q. Did it go down far? A. No; while I was there it was filled up with dirt and leaves and stuff that had apparently gathered in there and filled it up, so that where the hole actually was, up to the bottom of the planks, it was newly-made dirt and leaves that had fallen in. Q. This hole was the only defect you observed in the surface? A. It was the only hole in the sidewalk at that time.' Plaintiff testified that he did not know whether the electric light was burning at the time or not. While various witnesses testified to the bad condition of this sidewalk, yet they all used it. Just how long the hole had been there is not shown. Besides the testimony appearing upon the record, the jury, at the request of the defendant, were sent to view the sidewalk and the situation. They were therefore in position to determine whether the electric lights which the defendant claims

recover damages therefor. At the place of the accident the land was low. It had been filled in, and a tile put through the fill to allow the passage of water. In the north wheel track the tile had been broken in, leaving a hole about eighteen inches deep. This had existed for some months. Plaintiff testified that she was walking forward when she stepped into the hole. A schoolmate testified that she and plaintiff were running a race backward when she stepped in. She walked home, a mile and a half, after the accident,

were burning on the night in question would shine upon the sidewalk so as to disclose the hole." Opinion by GRANT, J.

In VERGIN *v.* CITY OF SAGINAW *(Michigan, January, 1901)*, 84 N. W. Rep. 1075, the question of plaintiff's contributory negligence was properly submitted to the jury, the facts of the case being stated by MONTGOMERY, Ch. J., as follows: "The plaintiff recovered a judgment of $730 for injuries received on a defective sidewalk. The plaintiff at the time of her injury was a married woman, forty-five years of age, living with her husband and family at 1023 Bond street N., between Bristol and Brewster. Bond street runs east and west, and is paved with cedar blocks and with stone curbing. Bristol street is the street just north of plaintiff's house, and runs east and west, and intersects Bond. Brewster street is the first street south of Bristol. Then there are Miller, Throop, and Clinton streets south in the order named. Porter street runs parallel with Bond, and is one block east of it, and intersects all the streets named, the same as Bond. A Mrs. Fellows lives at the corner of Porter and Clinton streets, and on the evening of April 6th, plaintiff, with her daughter, who is a music teacher, left home for the purpose of going to Mrs. Fellows' house. The corner of Porter and Clinton streets is about four blocks from where plaintiff lives. It is three blocks south and one block east. The plaintiff frequently passed over this walk during the previous summer, fall, and winter in going to the grocery and meat market. She knew the condition of the walk on which she was injured. She was interested in the walk, and in the summer of 1898 she notified Shefnecker, the alderman of the ward, to have this particular place where she was injured repaired. The walk in front of plaintiff's house and south of there and at the point of injury was about four feet wide. The distance from the outside edge of the walk to the street curb was about six feet, and both the walk and this ground between this curb and the walk were covered with snow and ice. Between the sidewalk proper and the curb of the street there is a space of several feet in that block. There were no trees between the sidewalk and the curb, and there were no obstructions of any kind, and there were no holes in the space between the sidewalk and the curb in that block at the time plaintiff was hurt. It was smooth and level between the sidewalk and the curb, except as the snow scraper had thrown up ridges of snow on either side, and except in one place where there was a ditch at the corner of plaintiff's walk extending out to the curb. The snow on each side of the path was probably a foot and a half deep. Plaintiff and her daughter left home the night of the accident for the purpose of going to Mrs. Fellows' house. They left the house, and walked to the street side, when they turned south. The daughter walked ahead in this narrow path, the mother following her. When they had gone about ten feet,

without difficulty. It is claimed by the defendant that the injury from which she suffered was caused afterwards, by a horse stepping upon her foot. This claim is sustained by several disinterested witnesses, but denied by plaintiff. Her own testimony as to the manner of the accident is as follows: 'The hole in the tile was broken through in the fall or early spring of '88 or '89. It might have been before that time. I noticed the hole some time before I stepped into it, having passed it twice each day during the school days. I went to school in the morning and came home in the afternoon of that day, and the hole was perfectly visible, and I had no difficulty in seeing it was there, and I had no difficulty in seeing where the wagon tracks were. On this day the school let out at four o'clock in the afternoon, and I started home as soon as it was out, and it was probably fifteen or twenty minutes after four when I got to the place where the hole was in the tile. It was some time the latter part of May or in June, and it was broad daylight. There was nothing to hinder me from seeing the hole, and if I had been looking down at the ground I would have seen it, as I had known

the plaintiff stepped into a hole, and fell, and injured herself. The hole in which she fell was filled with snow and slush, so that the hole was concealed, and the plaintiff could not see it. The snow had not been cleaned off the walk on this lot when she was injured. The walk on the south side of Bristol street between Bond and Porter streets in April and the spring of 1899, and the walk on Porter street, from Bristol to Clinton at this time, were good and safe for travel. Defendant's counsel contends that on this testimony it should be held that the plaintiff was guilty of contributory negligence as matter of law. The argument is that the plaintiff, knowing the defect, was at fault in negligently using the defective sidewalk That the only excuse which she offers is that she did not have the defect in mind at the time of the injury, and it is contended that this excuse is not sufficient. We have had frequent occasion to consider the effect of previous knowledge of a defect in a way or sidewalk as bearing on the question of contributory negligence." (Citing Lowell *v.* Watertown Tp., 58 Mich. 568; Dundas *v.* City of Lansing, 75 Mich. 499; Whoram *v.* Argentine Tp., 112 Mich. 20; Black *v.* City of Manistee, 107 Mich. 60; Grandorf *v.* R'y Co., 113 Mich. 496; Irion *v.* City of Saginaw, 120 Mich. 295). * * * "The defendant's counsel presented the following request: 'It appears from the testimony that Drs. Sample and McGregor made examinations of the plaintiff a short time after she claims to have been injured. Dr. McGregor made two examinations, and Dr. Sample made one examination. They were for the purpose of ascertaining her physical condition. The plaintiff has not called these witnesses. Her failure to produce them may be given such weight by you as you see fit.' The record discloses that the facts are correctly stated in the request. The refusal to give the request was error, within the ruling of Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. Rep. 176. For this error the judgment must be reversed, and a new trial ordered. The other justices concurred."

that it was there for a long time, and there was plenty of room to go around the hole. I had walked around it day in and day out as I passed. There might have been some difficulty if I had followed directly in the wagon tracks in passing the hole, as there was a mud puddle, and there would have been no difficulty about getting by there without getting into the hole. I was paying absolutely no attention to where I walked. I do not know as I thought about the mud puddle being there.' "

HOWARD, ROSS & HOWARD and H. P. STEWART, for appellant.

ALFRED AKEY and D. L. AKEY, for appellee.

GRANT, J. (after stating the facts). — I have examined all the negligence cases decided by this court — and they are many — against townships and cities for defective highways and sidewalks. I find none which presents the exact question now before the court. Plaintiff knew of the defect. It was apparent to any one. Travelers by carriage had made a new wheel track around it. She had passed it twice nearly every day for weeks. She was a girl of sufficient age and intelligence to, and did, appreciate the danger, and the necessity of avoiding the hole. She knew she was in its vicinity. She knew that a single glance would show her where it was, and that there was not the slightest difficulty in avoiding it, as she had always done before. If plaintiff's contention be the law, then the familiar rule that what one can, by the exercise of the slightest prudence or care, see, he must be held to have seen, does not apply to persons traveling in our public highways and streets. No excuse is given, except that she did not look. Is there no duty imposed upon travelers to look when they are traveling upon the public highways, in the very presence of known defects and danger? The court charged the jury that " it was the duty of Mary King, in passing along, to use ordinary care and prudence, and this care and prudence must be commensurate with the fact that she knew the hole was in the road; and if, by the exercise of ordinary care and prudence, she could have avoided it, she could not recover." Where can a jury find acts of care and prudence where one walks into a known dangerous place without looking? The court further said to the jury: " The defendant claims that the plaintiff was not in the exercise of ordinary care; that she knew of the defect in the highway; that she paid no attention to it; that she was running a foot race backward at the time she stepped into this hole. If you find that the claim of the defendant is true, then, however negligent the township may have been, she could not recover." The first two facts referred to in the above instructions, viz., that she knew of the defect and paid no attention to it, were admitted. The third

alone was denied. Under this branch of the charge the jury would have been justified in finding that if she was not running a foot race backward she was entitled to recover. What is the difference in result or in principle between walking backward into a known and apparent danger, and walking forward into the same danger without a thought or a look? What is the difference in result or in principle between walking forward into the same danger with one's eyes shut, or open without looking? The only theory upon which this verdict can be sustained is that it is not negligence to walk on a public highway, in the presence of a known dangerous defect, without thinking and looking. This, in fact, was the theory of the charge. Why should it be negligence to walk backward? This is one of the common sports of children even older than plaintiff. And, if she had walked into this hole while reading a book, — and reading books while walking is no uncommon thing, — would this have excused her? If, instead of this hole, one or two planks had been removed from a bridge to prevent teams from passing over it on account of a defect, but persons could safely pass over upon the stringers or a single plank laid over the hole, could a person recover damages for falling into such hole in broad daylight, upon the statement that he was aware of the opening, but did not think of it? There is no decision in this State which leads to such a conclusion. If there is, it ought, in my judgment, to be overruled. In all the cases there are circumstances surrounding the transaction to excuse the act of the plaintiff in getting upon the dangerous place. Plaintiff relies largely upon Dundas *v.* City of Lansing, 75 Mich. 499, 42 N. W. Rep. 1011. The accident in that case happened in the night-time. It was held that the darkness of the night, the storm, and her (plaintiff's) anxiety to get home were all circumstances that should be weighed by the jury as bearing upon her conduct. No such excusatory circumstances exist in this case. In Graves *v.* City of Battle Creek, 95 Mich. 266, 54 N. W. Rep. 757, the accident occurred in the night-time. Plaintiff, a woman, as an excuse for stumbling over a loose plank, which she might have seen, testified that just before she stumbled she heard a whistle and became frightened and hurried on. It was held that the court should have submitted to the jury the question of whether this circumstance, coupled with the fact that it was in the night-time, was sufficient to excuse her immediate attention to the walk at the exact time of the injury. In Lowell *v.* Watertown Tp., 58 Mich. 568, 25 N. W. Rep. 517, the accident happened on a dark and misty night, while plaintiff was walking along the highway. He knew of the defect, — a hole about a foot square, — and had it in mind. Held, that the question

of contributory negligence was for the jury, under all the facts and circumstances. The rule is well stated by Justice McGrath, in Dittrich *v.* City of Detroit, 98 Mich. 245, 248, 57 N. W. Rep. 125: "While contributory negligence is not to be presumed from the knowledge of the existence of the defect, such knowledge enjoins upon a party a degree of care commensurate therewith." In Grandorf *v.* Railway Co., 113 Mich. 496, 71 N. W. Rep. 844, plaintiff was held to have assumed the risk in passing over defective stones which she saw scattered across the walk. Could she have recovered had she testified that she did not see them, though it was broad daylight? Would she have been excused by testifying that she was not thinking of the situation, and, therefore, did not look? We might comment upon many other cases decided by this court, but do not deem it necessary. An examination of them will show how they differ in their facts from this case. Dillon thus states the rule: "The ordinary rules as to contributory negligence and its effect upon the right of recovery apply to cases such as we are now considering. Adverting in this place to the subject in a general way, it may be stated that if the person injured knew of the defect or obstruction, and ought reasonably to have avoided it by going outside or around it, and did not, he cannot recover." 2 Dill. Mun. Corp. 1007. In Casey *v.* City of Malden, 163 Mass. 507, 40 N. E. Rep. 849, a boy seven years old stepped backward into a manhole in the street. The hole was in plain sight, if the plaintiff had looked. Held, that he voluntarily adopted a dangerous method in crossing a public street, and his injury was a natural consequence of his carelessness. Would he not have been equally negligent if he had walked forward into the hole without looking? In Dale *v.* Webster Co., 76 Iowa, 370, 41 N. W. Rep. 1, plaintiff, while crossing a bridge at night, reading a letter by the use of his lantern, fell from a defective bridge. He was held guilty of contributory negligence. The negligence would certainly have been as great had he walked into the defect in the daytime while reading. The law does not excuse one for not looking when he knows of the danger, and may by a glance see it and avoid it. It would be a dangerous doctrine that one injured in the public highway in broad daylight may excuse himself by saying: "It is true that I knew of the dangerous place; that I was in close proximity to it; that I might have seen it had I looked. But I did not think of it, and therefore did not look." I find no case which lays down such a rule of law.

Judgment reversed, and, inasmuch as no different case can be made upon a new trial which would not be wholly inconsistent with plaintiff's case as here made, none will be granted. The other justices concurred.

McDONALD v. CITY OF ST. PAUL.

Supreme Court, Minnesota, January, 1901.

PEDESTRIAN INJURED — OBSTRUCTIONS IN STREET — WIRE STRETCHED ACROSS BOULEVARD — NEGLIGENCE FOR JURY. — The plaintiff was thrown down and injured by a wire stretched along the boulevard at a street corner, and this is an action to recover damages for her injuries. *Held:*

1. The primary purpose of a public street is to accommodate public travel, but whenever any portion of a street not devoted to business purposes can be set apart for park or boulevard purposes without any substantial impairment of such primary purpose, the city may set such portion apart for a boulevard.
2. When a city has rightly set apart and improved a part of a street for a boulevard, it is not bound to use due care to keep such part free from all obvious obstructions which are necessarily incident to its use as a boulevard, although they may endanger the safety of travelers thereon.
3. But a city has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall, or trap, or snare, or like obstruction, whereby the traveler may be injured.
4. The question of the negligence of the defendant in this case and of the plaintiff was rightly submitted as one of fact to the jury.

(Syllabus by the Court.)

APPEAL from District Court, Ramsey County.

Action by Marion McDonald against the city of St. Paul. From a judgment rendered on the verdict, defendant appeals. *Judgment affirmed.*

J. E. MARKHAM and F. W. ROOT, for appellant.

DANIEL W. DOTY and T. J. WHEELER, for respondent.

START, Ch. J. — The plaintiff, on the evening of December 2, 1899, while attempting to cross the street diagonally at the southwest corner of Marshall and Dewey avenues in the city of St. Paul, was thrown to the ground by a wire stretched along the boulevard at the street corner, whereby she was injured. She brought this action to recover damages for personal injuries so sustained on the ground that the city was negligent in permitting the wire to be in the street. Verdict for the plaintiff for $250. The defendant moved for judgment in its favor notwithstanding the verdict, which was denied, and it appealed from the judgment entered upon the verdict. The undisputed facts in this case, briefly stated, are these: Marshall avenue runs east and west, and is 100 feet wide, and is crossed at right angles by Dewey avenue, sixty-six feet wide. The central

fifty-two feet of Marshall avenue are graded and prepared for a roadway. Through the center of this roadway two street-car tracks are maintained and used for passenger traffic. On either side of this roadway are boulevards eighteen feet wide, and outside them are plank sidewalks six feet wide. On the dividing lines between the roadway and the boulevards are stone curbs. The boulevards are graded on a level with the sidewalks and the top of the curb. Grass and shade trees are growing on the boulevard. On Dewey avenue the boulevards are eleven feet wide. There is a walk across Marshall avenue on the west line of Dewey avenue, and the sidewalk on the south side of Marshall avenue west of Dewey avenue continues across the boulevard and into the roadway of Dewey avenue. At the intersection of Marshall and Dewey avenues, and between the crosswalks and the curb, at the southwest corner, is an oblong portion of boulevard eleven by eighteen feet. On the 18th day of November — two weeks before the accident — the owner of the adjoining property set out a tree near the center of the oblong tract. To support the tree, a small wire was wound around the tree about four or four and one-half feet from the ground, and fastened, one end thereof, to a stake driven into the ground at a point twenty-two inches north of the crosswalk leading to Dewey avenue, and three feet and two inches inside the curb, and the other end thereof to a stake driven into the ground at a point about seven feet and three inches north from the tree, and about five feet and five inches from the crosswalk leading across Marshall avenue. The tops of the stakes were driven nearly level with the surface of the ground. The stakes and wire could be readily seen by daylight, but not at night. The plaintiff, on the evening in question, and after dark, was walking rapidly (as she was afraid she would miss a car), on the sidewalk on the south side of Marshall avenue for the purpose of taking the car which was to stop on the east side of Dewey avenue. When she reached the corner, she attempted "to cut across" — that is, to cross diagonally — the oblong portion of the boulevard we have described, and in so doing she was caught by the wire, and thrown down and injured. While she could not see the wire, she observed the tree, and the surface of the ground, which appeared to be free from obstructions. The evidence as to the *locus in quo* indicates that pedestrians who were in a hurry, and knowing nothing about the wire, would be quite apt to "cut across the corner." The side and crosswalks were in a condition of safety, and the plaintiff would not have been injured if she had kept thereon. The place of the accident was in the residence district of the city, but it was about five miles from the center of the city, and was somewhat sparsely

populated. A mounted policeman, however, patroled the district for twenty-two hours each day, passing the corner in question frequently. It was his duty to report to his chief any defects in the streets or sidewalks discovered by him. The defendant requested the trial court to direct a verdict in its favor on the ground that, as a matter of law, upon the undisputed evidence, the defendant was not guilty of any negligence in the premises, but the plaintiff was guilty of negligence which was the proximate cause of the accident. This was refused by the court, and the ruling is here assigned as error.

The main question to be here considered is whether, upon the special facts of this case, the alleged negligence of the defendant was a question of law or fact. The contention of the defendant is that when, as in this case, a municipality sets apart, marks out by curbing or otherwise, and improves a portion of a street as a boulevard, it is notice to the public that such part of the street is not intended for travel, and that any person who, without any necessity, and solely for his own convenience, uses it instead of the sidewalk, assumes all risk of injuries from obstructions thereon; or, in other words, that the city, when it has so withdrawn and improved a part of the street, is not bound to maintain it in a condition of safety for pedestrians who leave the safe sidewalk, and go upon the boulevard. The plaintiff, on the other hand, claims, as we understand her counsel, that when a city improves a street to its full width, pedestrians have a right to travel on any part of the street, including the boulevard, without any necessity for so doing, and that the city is bound to exercise due care to keep all parts of the street relatively safe for public travel. The right of a municipality to determine within reasonable limits what part of a street in a residence district shall be set apart for the roadway for travel of all kinds, what part for sidewalks for the exclusive use of pedestrians, and what part for boulevards with grass, trees, and flowers planted thereon, is now undoubted. There are adjudged cases, decided in the early history of municipalities, when the stern taste and asceticism of the times could see no other use for a public street except as a means of getting from one place to another, which are not in harmony with the rule we have stated. But in this State streets are laid out or dedicated for many purposes other than the accommodation of public travel in the ordinary way. They are intended for the purpose of furnishing light and air, and in the residence districts for boulevarding portions of them, thereby adding to the beauty of the city, and contributing to the health and happiness of its citizens. Of course, the primary purpose of a street is to accommodate public

travel, but whenever any portion of a street not used for business purposes can be set apart for park or boulevard purposes without any substantial impairment of such primary purpose, the municipality may set apart such portion for boulevards and other similar public purposes. Having such right, and the marking out and improving of the boulevard being notice to pedestrians that it is not intended for the purposes of travel, it logically follows that the municipality is not bound to use due care to keep such portion of the street free from all obvious obstructions which are necessarily incident to its use as a boulevard, although they may endanger the safety of travelers thereon, even conceding, without so deciding, that a pedestrian, in the absence of a law or ordinance prohibiting it, has the technical legal right to travel wherever he pleases in the street. While this is true, yet the municipality has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall or trap, or snare, or like obstruction, whereby the traveler, yielding to the impulse of the average person to cut across the corner when in a hurry, may be injured. The trial court in substance so instructed the jury. Now, can it be held, as a matter of law, that the facts of this case do not bring it within this rule? This, in the last analysis of the evidence, is the pivotal question, and we answer it in the negative. It will serve no practical purpose to repeat or discuss the facts, for we are of the opinion that they present a fair question upon which reasonable men might, and probably would, draw different conclusions. If the accident had occurred on the boulevard between the block lines, instead of the one at the street corner, the case would not be so clearly one for the jury. The question of the defendant's negligence and that of the plaintiff, including the assumption of the risk, was rightly left by the court to the jury.

Judgment affirmed.

COLLINS, J. — If this accident had occurred anywhere upon the boulevard except at the corner, I am of the opinion that, on the authorities, there could have been no recovery. But, in view of the fact as to the place where plaintiff was tripped, I think the case was for the jury.

LAMMERS v. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court, Minnesota, January, 1901.

COLLISION AT STREET CROSSING BETWEEN TRAIN AND WAGON — SPEED OF TRAIN — INSTRUCTION — CONTRIBUTORY NEGLIGENCE — DAMAGES. — 1. In a personal injury case arising out of a collision at a street crossing between one of defendant's passenger trains and a pair of horses attached to a wagon in which plaintiff was riding, her husband being the driver, and in control of the horses, it is *held*, that on the question of the negligence of the defendant's servants in running the train at an excessive rate of speed a case was made for the jury, and that the court did not err in its charge upon this point. It is also *held*, that the case was for the jury upon the question of plaintiff's contributory negligence.

2. *Held*, that the damages awarded — $4,000 — are excessive, and must be reduced to $2,500.

(Syllabus by the Court.)

APPEAL from District Court, Stearns County.

Action by Mary Lammers against the Great Northern Railway Company. Verdict for plaintiff. Motion for judgment notwithstanding the verdict and for a new trial denied, and defendant appeals. *Affirmed on conditions.*

C. WELLINGTON, GEO. H. REYNOLDS and WM. R. BEGG, for appellant.

DONOHUE & STEPHENS and CALHOUN & BENNETT, for respondent.

COLLINS, J. — This action was brought to recover for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant, the particular negligence complained of being the careless and reckless running of a passenger train at an excessive rate of speed, without warning of the coming thereof by ringing the bell or blowing the whistle, as the train approached a street crossing in the village of Sauk Center. The crossing was in the outskirts on the south side of the village, and there were no buildings near the track to obstruct the view. The station at which the train always stopped was about 1,200 feet northwesterly of the street crossing. The plaintiff's husband was driving a pair of horses attached to a common lumber wagon, on the seat of which he sat, with the plaintiff, her two small children, and a young lady. It was about noon, rather cold, and plaintiff's head was wrapped up in a shawl, which also covered one of the children carried in her arms. The train was running northwesterly, and the team was being driven

north. The locality and the time of the arrival of the trains were well known to the plaintiff and to her husband, and the train in question was a few minutes behind time. It was in plain sight, and could have been seen by the occupants of the wagon had they looked to the right as they rode north, for over 1,500 feet easterly of the crossing. The husband sat on the extreme right of the seat, nearest the approaching train. The horses were driven onto the track, a collision occurred, the wagon was caught by the locomotive, the running gear thrown or carried about eighty feet, while the wagon box was overturned onto the pilot, and when the locomotive was stopped the occupants of the wagon all lay upon the pilot, partly covered by the wagon box. But one person was killed, — the young lady. Plaintiff's husband was not seriously injured, and, singular as it may appear, the children escaped unhurt. It was testified to by a number of eyewitnesses, and plaintiff's husband did not unqualifiedly deny, that he attempted to run his team across the track in front of the rapidly running train; and his negligence, gross, if not positively criminal, seems to be obvious. At the close of the testimony defendant moved the court to direct a verdict in its favor, for reasons specially mentioned, which motion was denied. A single exception was taken to the charge, which will be referred to later. The verdict was in favor of plaintiff for the sum of $4,000. On a duly-settled case the defendant made the blended motion for judgment notwithstanding the verdict, and, in default thereof, for a new trial, upon several grounds set forth in the moving papers. The motion was wholly denied, and defendant appealed.

The instruction of the court above referred to was in the following language: "But if you find, from the testimony in the case, that the defendant was guilty of negligence in failing to give the usual signals, or in running its train at an excessive rate of speed, and you further find from the facts that the plaintiff was not guilty of contributory negligence, then plaintiff is entitled to recover such damages as she has sustained by reason of the accident." Defendant's counsel excepted to that part of the charge which submitted to the jury the question as to the speed of the train as constituting negligence, it being claimed that there was not a word of evidence in the case tending to show that the train was run at an excessive rate of speed, or tending to prove that fact. We cannot agree with counsel on this point, for several of plaintiff's witnesses estimated the speed of the train; all saying that it was running faster than usual. One of them — accustomed to riding on the train in question — testified that it was going so rapidly at that point that she, then a passenger, became afraid that there was something wrong. We

are of the opinion that the rate of speed of the train as it approached the crossing was for the jury, and that the evidence fully justified the court in submitting to the jury the question of defendant's negligence in so far as the speed of the train was involved.

It was contended upon the argument that the plaintiff was guilty of contributory negligence, and for this reason the verdict should not be sustained. The law in this State is that the burden is on a defendant to establish contributory negligence on the part of a plaintiff. It is not presumed under any circumstances, and this rule governs here, notwithstanding the perculiar surroundings at the time of this accident. And for the purposes of this case we assume, as has been indicated by what has already been said, that the husband was exceedingly negligent in failing to look and listen before attempting to cross the railroad track (1). But under the well-settled rule in this State his negligence was not imputable to his wife, this plaintiff, as a matter of law. Finley *v.* Railway Co., 71 Minn. 471, 74 N. W. Rep. 174 (5 Am. Neg. Rep. 2 n). She was riding in the wagon with him. The team was under his management, and she had no control over him in that management, so far as the evidence shows. He was not her servant, and they were not engaged in a joint enterprise; and, taking the best possible view for defendant of the facts, the inquiry whether she was guilty of contributory negligence in failing herself to look and listen, or to observe that her husband was not using due care to look and listen, if such was the fact, was for the jury. It is possible that, if this question had been specially submitted, the jury might have found that plaintiff was guilty of contributory negligence. Certainly the failure on her part, when testifying, to remember what occurred — what she saw, or heard, or did — as the team was driven towards the crossing, would justify a belief that she was not frank or candid in her story. But the attention of the jury was not drawn to this particular point by any request for instructions as to her own failure to be prudent. In all fairness to the court below, and to the plaintiff herself, this should have been done, if there was any merit in the contention that she should not be allowed to recover because of her own failure to look and listen at this well-known place of danger. But, taking the undisputed facts that her husband was driving; that he sat upon the right, between her and the approaching train; that her head was covered up by the shawl; that she carried a babe, six months old, in her arms; that she had another child, two years old, to look after and that on the side track at the station, about 1,200 feet distant,

1. See note on the Rule of Stop, Look and Listen appended to the Wisconsin case of Brown *v.* Chicago & N. W. R'y Co., reported in this volume, *post.*

stood another passenger train east bound, which might have attracted her attention, — we ought not to say as a matter of law that the question of plaintiff's own negligence was not for the jury.

We are of the opinion that the damages awarded are excessive. No bones were broken, remarkable as it may seem; nor does it appear that the plaintiff was permanently disabled. Her shoulder was dislocated; she received a cut on the ear, which temporarily affected her hearing; and she was constantly confined to her bed for about four weeks. But she has had no need for medical treatment since, although in bed a portion of the month immediately following the four weeks above mentioned. It is not a case for a large award. We are of the opinion that the damages must be materially reduced, or that a new trial should be had. If, within ten days after notice of this decision, the plaintiff consents to a reduction of the verdict to the sum of $2,500, and in writing notifies defendant's counsel of such consent, the order appealed from will stand affirmed; otherwise, it will stand reversed, with a new trial granted.

NUTZMANN v. GERMANIA LIFE INSURANCE COMPANY OF NEW YORK.

Supreme Court, Minnesota, January, 1901.

EMPLOYEE INJURED IN ELEVATOR — FELLOW-SERVANT — PLEADING — VARIANCE. — 1. At a second trial of this action for personal injuries alleged to have been caused by an incompetent fellow-servant, the main facts as shown by the evidence did not differ materially from those established at the first trial. See 7 Am. Neg. Rep. 270, 81 N. W. Rep. 518. There was, however, a quantity of expert testimony as to the amount of instruction and experience necessary to render a man of ordinary faculties qualified to operate an elevator. *Held*, that, upon all of the evidence, the question whether defendant exercised ordinary and reasonable care when selecting the servant whose negligence when operating an elevator caused the injuries was for the jury (1).

2. It was alleged in the complaint that the operator suddenly and violently started the elevator upward with great force and rapidity, by reason of which plaintiff was unable to enter the same, and then carelessly and negligently stopped and suddenly lowered it a short distance. The proof was

1. See note on Elevator Accidents, 8 AM. NEG. REP. 146–157.

See also Perras *v.* Booth & Co. (Minn.), case next reported herein.

For other Elevator Cases, from 1897 to date, see vols. 1-9 AM. NEG. REP., and the current numbers of that series of Reports.

that, after being stopped, it was again moved upward, not lowered, with great rapidity. *Held*, that this variance between the allegation and the proof as to the movement of the elevator after it was first stopped was immaterial, and was properly disregarded by the trial court.

3. The claim is made by defendant's counsel upon appeal that from the evidence it conclusively appears that when the accident happened the plaintiff and the elevator man were not acting within the scope of their employment, but were using the elevator without authority, and for their own convenience simply. *Held*, that the claim is without merit.

(Syllabus by the Court.)

APPEAL from District Court, Ramsey County.

Action by Louis Nutzmann against the Germania Life Insurance Company of New York. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

C. D. & THOS. D. O'BRIEN, for appellant.

HOW & TAYLOR and PIERCE BUTLER, for respondent.

COLLINS, J. — The facts in this case, as they appeared at the first trial, are stated in a former opinion (7 Am. Neg. Rep. 270, 81 N. W. Rep. 518), and as so stated do not differ particularly from those shown upon the second trial, in which plaintiff had a verdict, an appeal being taken from judgment thereon. Defendant's claim at this time is that on the evidence as received upon the trial it was entitled to a directed verdict in its favor, a motion to that effect having been made when the testimony closed. The law applicable to the facts here was laid down in the former opinion, and the court below, having then directed a verdict in defendant's favor, was reversed for two reasons: First, because of its refusal to receive expert testimony offered by plaintiff's counsel as to the required amount of training and experience necessary in order to qualify and render a man capable of running an elevator; second, because, on the whole evidence as to the exercise of ordinary or reasonable care in the selection of the man in question, the case was for the jury. At the second trial there was an abundance of expert testimony as to the requisite training and experience, both parties producing witnesses; and, as might be expected, there was a difference of opinion among these gentlemen. But, taking the whole testimony of these experts, defendant's counsel assert that it is conclusively shown that defendant exercised ordinary and reasonable care and diligence when employing Mr. Hanft, and that there was no issue upon this point, and for this reason its motion should have been granted. It may be that the preponderance of evidence on this subject was with defendant, and to the effect that Hanft was sufficiently instructed when employed, and, with his subsequent experience prior to the accident, fully qualified to operate the elevator

when plaintiff was injured. But on all of the testimony these questions were for the jury. In passing, it is proper to say that in the former opinion it was stated that defendant's engineer, Hanft's brother, reported to its agent in charge of the building, prior to the employment, that Hanft could do the work required. The agent so testified at the first trial, and there was no contradiction. The agent also testified to this at the second trial, but the engineer emphatically denied that he had made such a report to the agent, and at the second trial this same engineer admitted that Hanft "got a little rattled when the car went a little too fast."

It was alleged in the complaint that Hanft suddenly and violently started the elevator upward with great force and rapidity, by reason of which plaintiff was unable to enter the same, and, further, that Hanft then carelessly and negligently stopped and suddenly lowered it for a short distance; while the proof was that the elevator was violently started upward, was then stopped very suddenly, and was then again moved upward with great rapidity. The witnesses did not state the movement of the elevator precisely as alleged in the complaint, and because of this discrepancy it is argued by counsel for defendant that there was a fatal variance between the complaint and the proof, which should have prevented the plaintiff from recovering. This variance was not material. It was very slight, and in no manner could it have misled counsel, or have been prejudicial to defendant. The trial court, as it was at liberty to, very properly disregarded it. Gen. St. 1894, secs. 5262, 5263.

It is also urged by counsel that from the testimony it clearly appears that Hanft and the plaintiff were not acting within the scope of their employment when using the elevator at the time of the accident, nor under circumstances which would render defendant liable for injuries sustained; and that the case is one of an unauthorized use of an elevator by employees for their own convenience simply. We have examined the charge of the court, together with defendant's requests for instructions, all made verbally, and immediately prior to the charge, and this point was not alluded to in any manner. There was no request to instruct upon it, and, if considered important, the attention of the court should have been directly called thereto, which was not done. This, of itself, is sufficient reason for disregarding this claim, made for the first time upon appeal. But, going beyond this, it is true that the testimony shows that, according to the rules of the building, the elevators stopped running at 12:30 P. M. It is also true that during the trial, and in response to an objection made to certain questions by plaintiff's counsel, attention was called to the general denial in

the answer, and the claim was then made that under this denial it was competent to show that under the rules the use of the elevator by employees was unauthorized at the time of the accident. But no further attention seems to have been paid to the point by defendant's counsel, and no stress was laid upon it. It seems to have been abandoned then and there. That it was not regarded as of importance is made clear by the fact that during the trial the plaintiff's counsel attempted to show that defendant's employees, including the plaintiff, were permitted to use the elevators at all times when they were at work and had occasion to use them. This testimony was objected to by defendant upon the ground that testimony upon this point was inadmissible, except as an affirmative defense to be introduced by defendant itself. Nor was it plainly shown that this accident occurred after the time at which, according to the rules referred to, the elevator should have ceased running. The plaintiff was injured about twelve P. M. In addition to this, it was conclusively established by the proofs that it was absolutely necessary for Hanft to use the elevator to do the very work in which he was engaged at the time he was called down from the floor above, and that he had habitually used it at such work. We think it very clearly appears that all of the defendant's employees involved in the accident were properly engaged in defendant's service, within the scope of their employment, when the accident happened, rather than in any independent enterprise of their own. We conclude that the defendant has been wholly unsuccessful in distinguishing the present appeal from the former one, and that upon all of these questions of fact the case was more clearly one for the jury than it was when tried the first time.

Judgment affirmed.

PERRAS v. A. BOOTH AND COMPANY.

Supreme Court, Minnesota, January, 1901.

DUTY OF MASTER TO FURNISH SAFE PLACE FOR EMPLOYEES — EMPLOYEE KILLED IN ELEVATOR SHAFT—CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK — FELLOW-SERVANT. — 1. It is the duty of the master to furnish his servant a reasonably safe and suitable place in which to perform his work, and to keep and maintain it in such condition, — not to guard and protect from the negligent acts and conduct of fellow-servants, but to put the place in a reasonably safe condition, and omit no personal duty to keep and maintain it in such condition.

2. In this action one Super was defendant's foreman, having general charge and control of its business, with authority to direct the employees of defendant when and where to work, and what particular duty to perform. On the day complained of, he had ordered plaintiff's intestate to perform certain work, and was aware of the fact that prior to the commencement of such work the place of performance thereof was put in a safe and proper condition to do the same. After so ordering deceased to do and perform such work, Super, without notice or warning to him, removed one of the instrumentalities used in the performance thereof, and thereby rendered the place of performance dangerous and unsafe, in consequence of which the employee was killed. *Held*, that the questions, 1, whether deceased was guilty of contributory negligence; 2, whether the act of Super was one of the ordinary risks of the employment of deceased, and assumed by him; and, 3, whether Super was, in the act complained of, acting in the capacity of foreman and vice-principal, or as a fellow-servant, — should have been submitted to the jury, under the evidence produced at the trial, and that the trial court erred in directing a verdict for defendant (1).
(Syllabus by the Court.)

APPEAL from District Court, Hennepin County.

Action by Elise L. Perras, administratrix of C. Perras, against A. Booth & Co. Verdict directed for defendant. From an order denying a new trial, plaintiff appeals. *Reversed.*

A. B. JACKSON and P. M. BABCOCK, for appellant.

KITCHEL, COHEN & SHAW, for respondent.

BROWN, J. — Action to recover for the death of plaintiff's intestate, caused by the alleged negligence of defendant. A verdict was directed for defendant in the court below, and plaintiff appeals from an order denying a new trial. Plaintiff's intestate was an employee of defendant, and received injuries while engaged in the discharge of his duties which resulted in his death. The negligence charged in the complaint as the cause of the death is the failure on the part of defendant to provide deceased with suitable and safe tools, instruments, and instrumentalities, and a reasonably safe and suitable place, for the performance of his duties. The facts are substantially as follows: At and for some time prior to the date of the accident, defendant, a corporation, owned and maintained a warehouse in the city of Minneapolis, used for the storage of its goods and property, and for the storage of the goods of other parties. The building was several stories high, and in the basement thereof were cold-storage rooms. A door opened from the rear of the building, on the ground floor, upon a railroad side track extending along the building, inside of which door was a freight elevator, used

1. See also Nutzmann *v.* Germania Life Ins. Co. (Minn.), preceding case reported herein. See note on Elevator Accidents, 8 Am. Neg. Rep. 146–157.

in connection with receiving goods from railroad cars, and conveying them either to the upper stories, or down in the basement to the cold-storage rooms, as the nature of the goods required. It was the custom of defendant, in unloading goods from the railroad cars, to connect the sill of the door with the floor of the car by an iron plate, forming an inclined plane from the car to the door sill, which was a few inches lower than the floor of the car. When so unloading cars the elevator was held stationary and on a level with the door sill, so that the hand trucks used in conveying the goods from the car would run down the iron plate on to the elevator without obstruction. The elevator shaft extended into the basement about ten feet. The doorway was protected by an outer door and an inner gate, but was not kept closed when the elevator was being used in connection with unloading cars; and, with the elevator away during such time, there was nothing to obstruct the entrance to the elevator shaft from this outer door. Defendant is a corporation, and conducted the business connected with its warehouse through a foreman and a manager. One Super was foreman and had general charge of the employees of defendant, and the performance of their work and duties, and gave orders to them as to what to do, and the manner of doing it. Plaintiff's intestate was a carpenter, and had been in defendant's employ for a number of years, performing such work from time to time as was required of him by the foreman. While not engaged in carpenter work he frequently assisted in unloading cars, when ordered to do so. On the day of the accident the foreman ordered him to assist another employee in unloading a car of fish. He complied with the order, and proceeded to the car with the other employee, and commenced the work of transferring the fish therein to the cold-storage rooms in the basement of the building. Before commencing the work, plaintiff's intestate opened and fastened the outer door leading into the elevator shaft. The fish in the car were in boxes of different sizes, which were transferred into the building by loading them upon a hand truck, and wheeling the truck down the iron plate connecting the car with the elevator, and lowering the elevator into the basement. The elevator was an essential instrumentality in doing this work, and was kept stationary and on a level with the door sill while the work was being carried forward. Super, the foreman, was superintending the work, and was in and about the car, giving orders and directions with reference thereto. After the work had been going on for some time, one O'Hair, an employee of another concern, occupying rooms in the building, called out from a second-story window that he wanted the use of the elevator. The foreman,

Super, replied to him, from the car door, that he could not have it, as they were using it in connection with unloading the car, and he then passed from the car towards the elevator door. On being informed by O'Hair that he wanted the elevator but a very short time, — two minutes, — Super, without notice or warning to the men in the car, pulled the elevator up to where O'Hair was, and assisted in removing some apples to the third floor. In the meantime the men in the car continued at their work, and, in following the directions of the foreman, loaded a number of boxes of fish upon the truck, and wheeled it out upon the iron plate, and prepared to run it down onto the elevator. Deceased did not know that the elevator had been removed. In lowering the truck to the elevator, it was customary for him to precede the same, walking backward, — his face to the truck, and back to the elevator, — to retard its motion and prevent a too rapid descent of the truck. He followed the usual custom in this instance, but did not notice the fact that the elevator had been removed until the truck was upon the plate, when it was too late to return it to the car; and he was forced and precipitated into the elevator shaft, and to the bottom thereof, and killed, the truck and entire load of fish falling upon him. The defense to the action is, 1, that plaintiff's intestate assumed the risks incident to a removal of the elevator without notice to him; 2, that the act of Super, the foreman, in removing the elevator, was the act of a fellow-servant; and, 3, that plaintiff's intestate was guilty of contributory negligence.

1. It is contended by counsel for defendant that deceased assumed the risk of the removal of the elevator without notice to him, and that for this reason plaintiff cannot recover. The rule as to assumption of risk is laid down very concisely in the case of Quick *v.* Iron Co., 47 Minn. 361, 50 N. W. Rep. 244, substantially as follows: "A servant is held ordinarily to assume such risks and dangers as are incident to the work or business engaged in, provided he knows and appreciates such risks and dangers; and he is held to know such as are manifest to one of ordinary common sense and observation, or which by the prudent exercise of the senses may be perceived and appreciated." It is urged by counsel that deceased knew that the doorway leading into the elevator shaft was unprotected by an automatic gate, that he also knew that the elevator could be easily removed by some other employee, and that there was an ever-present danger that it would be so removed, without his knowledge, in consequence of which the dangers resulting from such removal were ordinary risks of his employment. If the testimony in the case sustained counsel's contentions, their position

would be sound. But it does not. At least, our construction or analysis of the evidence leads us to the conclusion that the question should have been submitted to the jury. While it is undoubtedly true that deceased well understood that the doorway was not protected by an automatic gate, and assumed the risks in that respect, the evidence does not conclusively sustain the claim that other employees were in the habit of removing the elevator when being used as it was on this occasion, nor that there was an ever-present danger that it would be removed or taken from its position. On the contrary, the evidence fairly tends to show that it was not customary for such other employees to interfere with the elevator when so used. Such is the inference to be drawn from O'Hair's testimony; and the witness Kassure, a co-employee of deceased, testified that he never knew it to be removed under such circumstances. If it was the custom of the employees to remove the elevator at their will when being used for the purposes deceased was using it, and deceased knew of such custom, — and if it existed he undoubtedly did know of it, — he must be held to have assumed the dangers incident to such removal. But if there was not such custom, and it was, on the contrary, usual for such other employees not to interfere with or remove the elevator when so in use, without notice to those using it, deceased had the right on this occasion to assume that the usual order of things would prevail. Hooper *v.* Railway Co. (Minn.), 8 Am. Neg. Rep. 453, 83 N. W. Rep. 440. We are quite clear that the evidence does not conclusively sustain the position of respondent on this branch of the case, and that it is of such a character as to require the submission of the question to a jury. It is true that each employee used the elevator when he had occasion to do so, but the evidence does not show that it was ever taken by one when in actual use by another employee.

2. The second contention of defendant is that Super's act in removing the elevator at the request of O'Hair was the act of a fellow-servant, for which no liability attached to defendant. This presents the most difficult and most doubtful question in the case. Much has been said and written with reference to the law of fellow-servants and the application of the rule of vice-principal. The books abound in learned discussions of the question. Refined distinctions and theories are found on every hand, and no little confusion exists with reference to the subject. We find in one State a definite and clear rule, or statement of it, and in others the same rule with additions or modifications, and in still others an entirely different rule. And in those States, like our own, where there is a definite and well-defined rule on the subject, we still find confusion,

arising, not from a misapprehension of the law, but from the application of the rule to the peculiar facts of different cases. The rule in this State is stated in Lindvall *v.* Woods, 41 Minn. 212, 42 N. W. Rep. 1020, and illustrated in Carlson *v.* Exchange Co., 63 Minn. 428, 65 N. W. Rep. 914; Hess *v.* Manufacturing Co., 66 Minn. 79, 68 N. W. Rep. 774, and Vogt *v.* Honstain (Minn.), 8 Am. Neg. Rep. 443, 83 N. W. Rep. 533. We understand from these cases that an employee or servant who is clothed with special powers and authority with respect to the management of the master's business and the control of his other servants in the matter of the performance of their work, and to whom is delegated the performance of the master's absolute duty to other servants with reference to the obligation to provide them with safe instrumentalities and a safe place to work, is, as to such other servants or employees, a vice-principal, when engaged in the performance of the special powers and authority conferred upon him; he is a fellow-servant when engaged in the common employment of the master. In the case at bar it was the duty of defendant to furnish deceased with safe instrumentalities and a reasonably safe place in which to perform his duties, and to keep and maintain such place in a reasonably safe and suitable condition, — not to guard and protect from negligent acts and omissions of fellow-servants, but to put the place in a reasonably safe condition, and omit no personal duty to keep and maintain it in such condition. Did defendant perform that duty? There is no controversy as to the authority and duties of Super. He was defendant's foreman, having general charge and control over other employees and workmen, with power to direct and order them when and how to do the work of their employment, and was clothed with an apparent general supervision of defendant's business, in so far, at least, as related to this case. He had set deceased and his co-employee to work unloading the car, was in and about the car, and gave specific directions with respect to such work. The elevator was an essential instrumentality in the performance of that work, and, to render the place of performance safe and free from danger to workmen, it was absolutely necessary that it remain stationary at the point where connected by the iron plate with the car. There being no automatic gate to guard the doorway, the removal of the elevator rendered the place very dangerous, unless known to the workmen. The defendant furnished this instrumentality to deceased, and it was placed in proper position for the work, and subsequently removed therefrom, and the place made dangerous and unsafe, by the very person to whom defendant had delegated its duty to provide and maintain a safe and suitable place, not in

the performance of the work of defendant, but while acting in his capacity as representative of defendant, and by authority conferred upon him as such, and to accommodate one of the tenants in the building. He gave no warning to the men in the car, — at least, the evidence was such as to require the submission of that question to the jury; and we are asked to hold that his act in rendering unsafe the place he was delegated by defendant to keep in safe condition for employees was the act of a fellow-servant. We think this question should have been submitted to the jury. As we have already noted, the evidence does not conclusively show a custom among the employees of defendant to remove the elevator from its position when used in connection with unloading cars, as on this occasion, whenever any of them had other use therefor. O'Hair evidently understood that he had no right to take it without permission, or at least without warning to the men using it, and the evidence does not show that any of the co-employees of deceased had authority to permit it to be taken away under such circumstances. Whether, if it had been in fact removed at the time complained of by some co-employee while engaged in the discharge of the duties of his employment, defendant would be liable, we need not determine. Such is not this case. The fact is that it was removed by defendant's foreman, not in furtherance of defendant's business, but for the accommodation of O'Hair, an employee of Stacy & Son. The act was not in the line of the duties of any of defendant's employees, so far as the evidence discloses; and it was for the jury to say whether, under all the circumstances, the acts and conduct of Super were properly referable to the exercise of the powers conferred upon him as foreman of defendant and as a vice-principal, or whether as a fellow-servant of deceased, — whether the act was within the scope of his general powers and duties as vice-principal. The case of Hess *v.* Manufacturing Co., 66 Minn. 79, 68 N. W. Rep. 774, is, on principle, directly in point, and we follow and apply it. We have examined the record in this case with special care, owing to the importance of the case and of the questions involved; and in the light of former adjudications of this court, — especially the Hess Case, — and the evidence as presented in the record before us, as we understand its probative force, we reach the conclusion that the questions suggested, including the alleged contributory negligence, should have been submitted to the jury under proper instructions.

Order reversed.

HANLEY v. NORTH JERSEY STREET RAILWAY COMPANY.
HANLEY v. SAME.

Supreme Court, New Jersey, December, 1900.

NEGLIGENCE — EVIDENCE — QUESTION FOR JURY. — Where the evidence is conflicting upon the question of the defendant's negligence, or as to whether the negligence of the plaintiff contributed to the injury, the case is a proper one for the jury (1).
(Syllabus by the Court.)

ACTIONS by Annie Hanley and husband and by Patrick J. Hanley against the North Jersey Street-Railway Company. Actions were tried together Verdicts for plaintiffs. Rule to show cause why new trial should not be granted. Rule to show cause as to Annie Hanley made absolute on conditions, and, as to Patrick J. Hanley, discharged.

Argued June term, 1900, before the CHIEF JUSTICE and LUDLOW and FORT, JJ.

VREDENBURGH & GARRETSON, for the rule.

WARREN DIXON, opposed.

FORT, J. — The two cases above stated were tried together. The one was a suit by the wife (with whom the husband was, of necessity, joined) against the defendant to recover for injuries caused to the wife in a trolley accident occurring in Jersey City; and the other was a suit by the husband against the same defendant for the loss of services of the wife, and the damages resulting from the injuries to the horse and buggy which was being driven by the wife at the time of the accident, and which belonged to the husband. A careful reading of the evidence in the case and the charge of the court satisfies us that the whole matter was properly submitted by the trial justice to the jury; that a question of fact existed, as to whether the defendant was guilty of negligence, under the evidence in the cause, and also as to whether the wife, Annie Hanley, was guilty of any negligence on her part which contributed to the accident.

1. *Directing verdict.* — In FRIEDMAN *v.* NORTH HUDSON COUNTY R'Y CO. *(New Jersey Err. and App. November, 1900)*, 47 Atl. Rep. 631, an action to recover damages for personal injuries sustained while alighting from one of defendant's trolley cars, it was held that when a case turns on questions of fact, as to which the proof is in substantial conflict, it is error to direct verdict for defendant. Judgment for defendant reversed.

The jury have found upon both questions against ithe defendant. In view of the contradictory character of the evidence, the court would not be justified in disturbing the verdict upon that account. These findings result in an affirmance of the rulings of the trial justice on the motions to nonsuit, and to direct a verdict for the defendant.

The only remaining question is, were the damages excessive? The damages found for the husband for loss of services and society of the wife, and for his physician's bill and damage to his buggy and horse, were $150. The trial justice practically told the jury that there was no loss of service or society, and that no damages should be allowed on that account. We are inclined to think that they have followed his advice, and that the award of damage to him was not excessive upon the other elements of damage in the cause. The injuries to the wife were not serious. No bones were broken. No wounds were inflicted that were more serious than mere contusions, and no proof that would justify any inference of possible future injurious results from the accident was made. The evidence is also meager as to whether she was affected anywise injuriously, even temporarily by shock. As to her, we think the verdict should be reduced from $750 to $500. The rule to show cause as to the husband is discharged. As to the wife, the rule is made absolute, unless she will consent to reduce the verdict in her favor to the sum of $500, in which event judgment will be entered for that sum.

GRIFFEN v. MANICE.

Court of Appeals, New York, March, 1901.

ELEVATOR WEIGHT FALLING ON PASSENGER IN ELEVATOR — *RES IPSA LOQUITUR.* — In an action to recover damages for the death of plaintiff's intestate caused by the fall of an elevator weight while he was a passenger in an elevator operated in defendant's office building, it was held that the court properly permitted the jury to infer negligence from the accident, the term accident including not only the injury but the attendant circumstances (1).

GRAY, J., and PARKER, J., doubt the application of the rule of *res ipsa loquitur* to this class of cases.

1. See note on the Doctrine of *Res Ipsa Loquitur*, 3 Am. Neg. Rep. 488–496. See also note on Elevator Accidents, 8 Am. Neg. Rep. 146–157.

For other actions arising out of Elevator Accidents, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

OPERATION OF ELEVATORS — DEGREE OF CARE. — Owners or occupants of a building in which passenger elevators are operated, are required to use reasonable care in the character of the appliance they provide and in its maintenance and operation, but are not bound to the utmost human care and foresight to avoid danger. The rule as to the utmost human care may be applied in the operation of railroads where, for a consideration, there is a contract to carry safely, but not to the operation of elevators in office buildings.

BARTLETT, J., and MARTIN, J., dissented.

EXEMPTION CLAUSE IN LEASE NOT APPLICABLE TO EMPLOYEES OF LESSEE. — A provision in the lease between defendant, the owner of a building, and an insurance company, that "the landlord shall not be responsible for any loss or injury arising from or during the use or operation of the elevator or the carelessness or negligence of any person," does not exempt the owner from liability for injuries to plaintiff's intestate, an employee of the insurance company, although the latter was aware of such provision, as the lease does not apply to the personal rights of employees of the lessee.

APPEAL from a judgment of Supreme Court, New York, Appellate Division, First Department, affirming a judgment in favor of the plaintiff entered upon the verdict of a jury. *Judgment reversed.*

DAVID B. HILL, for appellant.

ROBERT M. BOYD, JR., for respondent.

CULLEN, J. — This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the defendant's negligence. On December 6, 1898, the defendant was the owner and in possession of an office building in the city of New York in which there was maintained and operated an elevator for the carrying of passengers to and from the several floors. The deceased was the secretary of the United States Fire Insurance Company, which had leased offices in the basement and also in the seventh and eighth stories. On the day in question, after having attended a meeting of the directors of the company, held on the eighth story, he took the elevator to return to the basement. The evidence tends to show that the elevator car descended with unusual rapidity, and, instead of stopping at the basement, which was the lowest floor, passed beyond until it struck the bumpers at the bottom of the shaft with such force as to rebound about eighteen inches and throw some of the occupants of the elevator down. Almost immediately therafter the counterbalance weights, which move in a reverse direction to that of the car and consist of pieces of iron, each from forty to sixty pounds in weight, fell down the shaft, breaking through the top of the elevator car. One of them struck the plaintiff's intestate on the head, killing him instantly. The plaintiff recovered a verdict at the Trial Term, and the judgment

entered thereon was unanimously affirmed by the Appellate Division. By leave of the Appellate Division an appeal has been taken to this court.

As the decision below was unanimous, the exception to the denial of the defendant's motion to dismiss the complaint at the close of the evidence and the question of the sufficiency of the evidence to support the verdict cannot be argued in this court (Constitution, art. 6, sec. 9), and our review of the case must be confined to the correctness of the trial court in its rulings on the admission of evidence and its charge to the jury. We shall limit our discussion to the consideration of the three most important objections urged by the appellant against the recovery.

The trial court, over the appellant's exception, charged to the jury: "There is another rule which the plaintiff asks me to call to your attention, and I am going to call to your attention the rule that where an accident happens which, in the ordinary course of business, would not happen if the required degree of care was observed, the presumption is that such care was wanting, and, if you find in this case that this accident was one which, in the ordinary course of business, would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting." It is insisted for the appellant that this instruction was erroneous, and that the jury was not authorized in this case to infer the existence of negligence from the accident alone. Primarily, it is argued that the principle which usually passes under the name of *res ipsa loquitur* applies only to cases where the relation between the parties is the contractual one of carrier or bailee, or in which the party injured has been injured while on a public highway. While there are some expressions to be found in text-books and decisions which seem to support this claim, in my judgment it is unfounded and the application of the principle depends on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly so far as that relation defines the measure of duty imposed on the defendant. Writing of *res ipsa loquitur*, it is said in Shearman & Redfield on Negligence (sec. 59): "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer."

I think a single illustration will show the correctness of the view of the learned authors, that it is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The *res*, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish or to justify the jury in inferring the existence of the traversable or principal fact in issue — the defendant's negligence. The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident which the plaintiff is unable to present. Neither of these rules — that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact, but slight evidence is requisite to shift on him the burden of explanation — is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined either in civil or criminal actions. In a prosecution for selling liquor without license, it is sufficient for the people to show the sale, leaving the defendant to show his license if he has one. Potter *v.* Deyo, 19 Wend. 361. Recent possession of stolen goods warrants the inference that the possessor is the thief, both because experience shows that usually the party so in possession is the thief, and because the knowledge of how he came into possession of the goods is generally exclusively his own. In Breen *v.* N. Y. Cent. & H. R. R. R. Co., 109 N. Y. 297 (1), it is said: "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." I can see no reason why the rule thus declared is not applicable to all cases or why the probative force of the evidence depends on the relation of the parties. Of course, the relation of

1. There is a note of Breen *v.* N. Y. Cent. & H. R. R. Co., 109 N. Y. 297, in 9 Am. Neg. Cas. 664.

the parties may determine the fact to be proved, whether it be the want of the highest care or only want of ordinary care, and, doubtless, circumstantial evidence, like direct evidence, may be insufficient as a matter of law to establish the want of ordinary care, though sufficient to prove absence of the highest degree of diligence. But the question in every case is the same whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue. In Mullen *v.* St. John, 57 N. Y. 567, it was held that the falling of an adjacent building into the street, whereby the plaintiff traveling on the street was injured, was *prima facie* evidence of negligence. In Piehl *v.* Albany R'y, 30 App. Div. 166, aff'd 162 N. Y. 617, a fly wheel was disrupted and a portion of it cast across the street into a saloon, killing the plaintiff's intestate. It was held that the mere bursting of the fly wheel was not sufficient to warrant an inference of negligence. These two cases proceeded on the differing views that this court took as to the nature of the respective accidents, not on the situation of the parties. I think it may be safely said that we would not have held the defendant liable in the latter case had Piehl been killed in the street, or in the earlier case, the defendant exempt, had the plaintiff been injured while in a neighboring building. To put it tersely, the court thought that in the absence of tempest or external violence a building does not ordinarily fall without negligence; while it also thought that the disruption of a fly wheel proceeds so often from causes which science has been unable to discover or against which art cannot guard, that negligence cannot be inferred from the occurrence alone. Authority is not wanting on the point. In Green *v.* Banta, 16 J. & S. (N. Y.) 156, a workman was injured by the breaking down of a scaffold. In a suit against his master the court charged: "The fact that the scaffold gave way is some evidence — it is what might be called *prima facie* evidence — of negligence on the part of the person or persons who were bound to provide a safe and proper scaffold." This charge was held correct by the General Term of the Superior Court of the City of New York and the decision affirmed by this court (97 N. Y. 627.) In Mulcairns *v.* Janesville, 67 Wis. 24, the fall of a wall was held presumptive evidence of negligence in a suit by a servant against his master. In Smith *v.* Boston Gas Light Co., 129 Mass. 318, it was held that the escape of gas from the pipes of a gas company was *prima facie* evidence of negligence. In this case there seems to have been no contractual relations whatever between the parties. In Peck *v.* N. Y. Central, etc., R. R. Co., 165 N. Y. 347, which was an action for injury to plaintiff's property by fire, it was said: "But while it

was necessary for the plaintiff to affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engine, for which the mere occurrence of the fire was not sufficient, it was not necessary that he should prove either the specific defect in the engine or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if he proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition or negligently operated." This is the principle which underlies the maxim of *res ipsa loquitur*. When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of *res ipsa loquitur;* when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence. In Benedick *v.* Potts, 88 Md. 52, it is said: "In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. * * * This phrase (*res ipsa loquitur*) which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as to the cause of that accident."

Returning now to the case before us, it appears that the deceased was present by the implied invitation of the defendant, extended to him and all others who might have lawful business on the premises, to use the elevator as a means of proceeding from one story to another. The defendant, therefore, owed the plaintiff the duty of using at least reasonable care in seeing that the premises were safe. The death of the plaintiff's intestate was caused by the fall of the counterbalance weights. These weights were held in a frame, to which was attached a rope or cable passing around a drum. The weights fell down from the frame and the rope was thrown off the drum. That no such accident could ordinarily have occurred had the elevator machinery been in proper condition and properly operated seems to me very plain. The court was, therefore, justified in permitting the jury to infer negligence from the accident, construing, as I do, the term accident to include not only the injury, but the attendant circumstances.

The next exception of the appellant relates to the degree of care

which the learned trial court instructed the jury the defendant was bound to exercise. The court charged: "As to the machinery and appliances by which an elevator is moved and controlled in its ascent and descent an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and he is, in that respect, subject to the same rule that applies to a railroad company in regard to its roadbed, engine and other similar machinery. Now, the rule that is applicable to a railroad company as to its roadbed, engine and machinery is that they are bound to exercise the utmost care and diligence and are liable for the slightest neglect against which human prudence and foresight might have guarded." This instruction is sustained by the decision of the Supreme Court of California in Treadwell *v.* Whittier, 80 Cal. 574. In McGrell *v.* Buffalo Office Building Co., 153 N. Y. 265, 2 Am. Neg. Rep. 598, the question was discussed by counsel, but not passed upon by the court in its disposition of the case. In determining the correctness of the rule of liability laid down by the trial court, the relation of the parties, which I think not controlling on the application of the maxim *res ipsa loquitur*, is of vital importance. Doubtless no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant as owner of the property is deemed to have extended to all who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition for access and entering (2 Shearman & Redfield, sec. 704; Beck *v.* Carter, 68 N. Y. 283), but "the measure of his duty was reasonable prudence and care" (Larkin *v.* O'Neill, 119 N. Y. 221; Hart *v.* Grennell, 122 N. Y. 371). If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator, no doubt, involves danger, and if accident occurs it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings. The boiler which

furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous. Yet it has never been attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care. It is very probable that, in the advance of mechanical arts, many new appliances will be introduced into buildings which will involve danger. It seems to me impracticable to distinguish as to the measure of the owner's duty between these appliances, and that such an attempt would involve great confusion in the law. I do not wish to be misunderstood. In the exercise of the same degree of care, different degrees of precaution may be necessary. The same man with equal prudence will leave an article of furniture unguarded in his house and carefully secrete or lock up jewelry or money. So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of the court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device and the most skilful operators. Such is the rule in the operation of railroads, and this degree of diligence may well be required where, for a consideration, there is a contract to carry safely. But common knowledge informs us that such a rule would be unreasonable as applied to elevators in ordinary buildings. There are elevators not only in great office buildings and hotels, but also in small buildings, and even in many private houses. Where there is little traffic the duty is at times imposed on an employee or servant with other work to perform. To require in all these cases (and I do not see how it is possible to distinguish between them on the law) the same measure of duty that is imposed on a railroad company or common carrier would be going too far. I think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care in the character of the appliance they provide and in its maintenance and operation. The stairways are always open to those who deem this degree of diligence inadequate for their protection. The charge of the learned trial court was, therefore, erroneous.

Though what has been said disposes of the case, another question is presented to us, which, as it will arise on a new trial, we think proper to decide. By the written lease between the defendant and the insurance company it is provided that "the landlord shall not

be responsible for any loss or injury arising from or during the use or operation of the elevator or the carelessness or negligence of any person." The appellant contends that by this provision he is exempt from any liability for the injuries to the plaintiff's intestate. The lease was attested by the deceased as secretary of the company in accordance with its by-laws. It must be presumed, therefore, that he was aware of its contents and assented to its terms, if those terms affected him. But the lease does not purport to apply to the personal rights of the officers or employees of the lessee. See opinion, Allen, J., Blair *v.* Erie R'y Co., 66 N. Y. 313 (1). There is this marked distinction between the present case and those in which the carrier has sought to be relieved from liability to a servant injured on a train by virtue of the terms of some agreement with the employer exempting the carrier from liability. In those cases the right of the employee to be on the train at all emanated from the contract made with his employer. Not so here. The right of the deceased to transportation in the elevator was based on the general invitation of the defendant to persons having business to transact in the building. The fact that he was in the employ of the tenant did not limit his rights.

The other exceptions argued by the learned counsel for the appellant relate to rulings that may not occur upon a new trial, and, therefore, do not require our notice; for the error in the charge already stated, the judgment should be reversed and a new trial granted; costs to abide the event.

GRAY, J. — I concur with Judge Cullen's opinion, in so far as it holds that the judgment should be reversed and a new trial had for the error committed by the trial court in instructing the jury as to the degree of care which the defendant was bound to exercise.

I have grave doubts whether this is a case for the application of the rule *res ipsa loquitur*, which has never been applied to this class of cases.

As it is unnecessary to our decision that the question of the application of the rule should be passed upon, I think it is wiser policy to reserve it for a future occasion.

BARTLETT, J. (dissenting). — I agree with Judge Cullen that the court was justified in permitting the jury to infer negligence from the accident.

I also agree that the lease has no effect on plaintiff's right to recover.

I dissent from that portion of the prevai ing opinion which holds

1. There is a note of Blair *v.* Erie R'y Co., 66 N. Y. 313, in 9 Am. Neg. Cas. 615.

the charge of the trial judge erroneous which instructed the jury that as to the machinery by which an elevator is moved and controlled the owner is bound to exercise the utmost care and diligence, and is liable for the slightest neglect against which human prudence and foresight might have guarded. In these days of lofty buildings and the annual transportation of millions of passengers in elevators by interested owners, who could not otherwise rent their property, public policy requires them to exercise the same degree of care as is imposed on common carriers.

VANN and WERNER, JJ., concur with CULLEN, J., for reversal; GRAY, J., reads concurring memorandum, with whom PARKER, Ch. J., concurs; BARTLETT, J., reads dissenting memorandum, with whom MARTIN, J., concurs.

Judgment reversed, etc.

HENAVIE v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Court of Appeals, New York, March, 1901.

FAILURE OF RAILROAD COMPANY TO EXERCISE PROPER CARE AT RAILROAD CROSSING. — A railroad company which runs a locomotive rapidly, in the night-time, upon a public street in a populous city, crossing other streets at grade, with no gate or flagman to protect the public, and without taking any precaution to warn travelers by bell, whistle or otherwise, except by means of its headlight, may properly be found guilty of neglecting its duty to operate its cars with the care and caution required by the circumstances.

PEDESTRIAN STRUCK AND KILLED BY TRAIN AT RAILROAD CROSSING — CONTRIBUTORY NEGLIGENCE. — In an action to recover damages for the death of plaintiff's intestate who was killed by one of defendant's trains at a railroad crossing, it appeared that as deceased started to cross defendant's tracks he looked both to the right and left, and when half way between the curb and the nearest track looked again in both directions, when he was struck by an approaching freight train which was moving quietly without signal of approach. *Held*, that it could not be said, as matter of law, that the deceased was guilty of contributory negligence, that being a question for the jury to determine under the circumstances (1).

1. For other actions relating to Pedestrians Injured at Railroad Crossings, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

Accident at crossing—Contributory negligence — In ST. JOHN *v.* NEW YORK CENTRAL AND HUDSON RIVER R. R CO. *(Court of Appeals, New York, January (1901*, 59 N. E. Rep. 3, an action for

APPEAL by permission from a judgment of the Supreme Court, New York, Appellate Division, First Department, overruling the exceptions of the plaintiff, denying his motion for a new trial and dismissing his complaint. *Judgment reversed.*

Action brought to recover damages alleged to have been sustained through the negligence of the defendant, which resulted, as it is claimed, in the death of the plaintiff's intestate.

GEORGE W. MILLER and BENJAMIN PATTERSON, for appellant.

CHARLES C. PAULDING, for respondent.

VANN, J. — Upon the trial of this action evidence was given tending to establish the following facts: Eleventh avenue and

injuries received at a railroad crossing, judgment of nonsuit was reversed, it being error to direct verdict for defendant, as the questions of negligence of the parties should have been submitted to the jury. Bartlett, J., after stating the facts, said: "The learned counsel for the plaintiff insists that the question of negligence on the part of the defendant should have been submitted to the jury, and that there were four distinct acts on the part of the defendant which contributed to the plaintiff's injury: 1. It was negligence on the part of the defendant to start the train upon track No. 1 without proper warning, by whistle or bell, advising the plaintiff of the approach of that train, his attention being absorbed by the noise of the train passing immediately in front of him on the track south of No. 1. 2. If the place where the plaintiff stood was unsafe, it was negligence on the part of the engineer on track No. 1 to start while the train on the track next south was moving over the crossing. 3. That it was a question of fact for the jury whether the place occupied by the plaintiff, under all ordinary circumstances, was or was not a dangerous position. 4. As the evidence now stands, it is clear that the train on track No. 1 was moving at a dangerous rate of speed, in view of the condition of the crossing at University avenue at the time of the accident. It is also urged on behalf of plaintiff that it was a question of fact for the jury whether the plaintiff was free from contributory negligence. It appears that this crossing was some 350 feet in length, and that the flagman, whose duty it was to caution pedestrians as to the movement of trains, was not at his post of duty. It was a question for the jury whether the place where the plaintiff was standing was a reasonably safe one, under the circumstances, if the trains had been passing each other in a normal condition. As the evidence now stands, the injury to the plaintiff was directly due to the projecting timber from the shifting train on the track south of No. 1. The plaintiff, having been nonsuited, is entitled to the benefit of every fact that the jury could have found from the evidence, and to all the inferences warranted thereby. McNally *v.* Insurance Co., 137 N. Y. 395, 33 N. E. Rep. 475; Stuber *v.* McEntee, 142 N. Y. 205, 36 N. E. Rep. 878; Costello *v.* Railroad Co., 161 N. Y. 320, 55 N. E. Rep. 897, (7 Am. Neg. Rep. 317 n). The trial judge should have submitted to the jury the question of the contributory negligence of the plaintiff and the negligence of the defendant. The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event."

Crossing street-car track — Contributory negligence — In FRANK *v.* METROPOLITAN STREET R'Y CO. *(New York,*

Forty-fifth street, in the city of New York, cross each other substantially at right angles. In the avenue as it crosses Forty-fifth street, and on an even grade therewith, are two railroad tracks belonging to the defendant, upon which engines are run propelled by steam. On the 5th of April, 1895, at about 9:30 in the evening, on a clear night, the plaintiff's intestate, thirty-two years of age and in the full possession of his faculties so far as appears, started to walk across the avenue on the crosswalk extending from the southeast to the southwest corner of the two streets. It was 22.3 feet from the curbstone where he started to the first rail of the nearest track. He lived in the neighborhood and was familiar with the crossing.

At this time an engine, attached to a few freight cars, was either standing still at Forty-fourth street, as two witnesses stated, or was

Supreme Court, App. Div., First Dept., February, 1901), 68 N. Y. Supp. 537, action for injuries sustained by plaintiff while crossing street-car track, judgment for plaintiff was affirmed, the court (per HATCH, J.), stating the facts as follows: "The action was brought to recover damages for personal injuries on the ground of the negligence of the defendant in the operation and management of a street car propelled by horses. The plaintiff was a man of sixty years of age, and familiar with the locality. About 7:30, on a dark night, in bad weather, when it was raining, snowing, and slushy underfoot, the plaintiff was walking on Orchard street, in company with his son, daughter-in-law, and their children. He preceded the rest, leading one of the children by the hand, and while attempting to cross Stanton street, which intersects Orchard street, he was struck by the horses attached to the car, and received the injuries of which complaint is made. The testimony upon the part of the plaintiff tended to establish that when he reached Stanton street the car was distant from the crossing about 100 feet. The first rail of the track was distant nine feet and one-quarter of an inch from the curb, and the whole distance across defendant's tracks was thirteen feet nine and one-quarter inches, so that, in order to cross the track and clear the car, the plaintiff had to go this distance while the car was covering 100 feet. The plaintiff had crossed the first rail of the track when he was struck. Upon these facts it was claimed that plaintiff was guilty of contributory negligence as matter of law, and that it precludes a recovery. We do not think that the court can say as matter of law that the plaintiff was guilty of contributory negligence in assuming that it was safe for him to travel the distance which he had to travel to clear the track before the car would reach that point. The proof is that before reaching the crossing he looked both ways, and we think that he was properly chargeable with what he then saw, but we do not think that the relative distance of the car and the distance which the plaintiff had to walk to clear the track indicated such a disregard of danger in such act as to say, as matter of law, that he took the chances, and was guilty of contributory negligence. It is said that the car was approaching at a high rate of speed, but he had the right to assume that it was under control, and would be operated with a due regard to his rights. In the language of VAN BRUNT, P. J., in Buhrens *v.* Railroad Co., 53

backing on the south track from Forty-fourth street toward the crossing, and a passenger train was approaching on the north track going in the opposite direction. There was neither gate nor flagman at the crossing, and no whistle was sounded or bell rung, or any kind of warning given of the approaching engine, except that a headlight on the end of the tender was lighted. The engine was moving so quietly that two observers who saw the headlight thought it was standing still. The deceased was walking along in the usual way, going straight across and whistling as he walked. As he started across he was seen to look both to the right and left, and as he was halfway between the curb and the nearest track he looked again in both directions. In an instant he reached the first rail, was struck and mortally injured. The engine was described by one witness as moving "fast," by another as moving "swift," and by the engineer as moving at from four to four and one-half miles an hour. It stopped, as one witness testified, after the first trucks of the first car had passed over the decedent. It moved the length of a block while he walked twenty-two feet. At the close of the evidence for the plaintiff the court dismissed his complaint and ordered his exceptions to be heard in the first instance by the Appellate Division, where they were overruled and the motion for a new trial was denied. From the judgment entered accordingly the plaintiff, after obtaining permission, appealed to this court.

There was a conflict in the evidence as to whether the bell on the engine which ran over the plaintiff's intestate was ringing or not. The accident was seen by two witnesses, one standing at the northeast corner of the crossing, who, after stating that he observed the train, testified that he heard no noise coming from the engine

Hun, 571, 6 N. Y. Supp. 224: "Assuming that the plaintiff saw the car approaching very fast, still there was nothing to indicate to him that it was not under the control of the driver, and he had a right to suppose that the latter would exercise proper care. The plaintiff supposed that he would clear the car, and, although subsequent events proved that he erred in this conclusion, a mere error of judgment was not necessarily negligence when the proof shows that, had the car been properly managed, as the plaintiff had a right to assume that it would be, he would have been enabled to cross in safety." Such rule is supported by numerous authorities. Zimmerman *v.* Railway Co., 3 App. Div. 219, 38 N. Y. Supp. 362; Brozek *v.* Railway Co., 10 App. Div. 360, 41 N. Y. Supp. 1017; Dunican *v.* Railway Co., 39 App. Div. 497, 6 Am. Neg. Rep. 155, 57 N. Y. Supp. 326. It is quite clear that the car was operated in disregard of the plaintiff's rights; at least, the jury had a right so to find. Upon the question, therefore, of negligence and contributory negligence, we think that the evidence was sufficient to sustain the verdict which has been rendered." VAN BRUNT, P. J., dissented, it seeming to him that plaintiff was guilty of contributory negligence.

and that he did not hear any bell rung; the other, who was walking between Forty-fifth and Forty-sixth streets, testified that he observed the train and that no bell was rung. On his cross-examination, after stating that he was positive that no bell was rung, the record discloses the following: "Q. How are you sure of that? A. I did not hear it. Q. That is all you mean to say, you did not hear it? A. I did not hear it. Q. That is what you mean to say when you say it was not rung? A. It was not rung. Q. I say when you say it was not rung, you mean to say you did not hear it rung; isn't that so? A. If I can't hear it it can't be rung. Q. When you say the bell was not rung, you mean to say you did not hear it? A. That I did not hear it. Q. That is all you mean to swear? A. It was not rung." The engineer, who was called by the plaintiff, testified that the bell was ringing when the accident happened, but he did not state how long it had been ringing.

A witness, shown to have been in a position to hear, who testifies that he observed the engine, but did not hear the bell ring, furnishes some evidence that the bell was not ringing, and if he is positive that the bell was not rung he furnishes strong evidence that the bell was not ringing. The evidence of the witness in this case, who was positive upon the subject, was not materially affected by his cross-examination, for while he said he did not hear the bell, when asked if that was all he meant, twice answered that it was not rung. The answers were not inconsistent. We assume, therefore, that the jury might properly have found that the bell was not rung.

A railroad company which runs a locomotive, rapidly, in the night-time, upon a public street in a populous city, crossing other streets at grade, with no gate or flagman to protect the public, and without taking any precaution to warn travelers by bell, whistle or otherwise, except by means of its headlight, may properly be found guilty of neglecting its duty to operate its cars with the care and caution required by the circumstances. Dyer *v.* Erie R'y, 71 N. Y. 228; Houghkirk *v.* Delaware and Hudson Canal Co., 92 N. Y. 219; Thompson *v.* N. Y. C. & H. R. R. R. Co., 110 N. Y. 636; Vandewater *v.* N. Y. & N. E. R. R. Co., 135 N. Y. 583, 588.

Whether the decedent was conclusively shown to have been guilty of contributory negligence depends upon what occurred in an instant of time. He looked in both directions when he started to cross, and when he was halfway to the nearest rail he looked in both directions again. Therefore, in order to justify the action of the courts below, it must be held, as matter of law, that it was his duty to look again while passing over the remaining space of eleven feet, or that in looking he was negligent in failing to observe the

approaching freight train. The jury had the right to find that the engine, through its quiet movement, made the same impression upon him that it did upon the only two observers who were called as witnesses, both of whom testified that they thought it was standing still, and that before they realized it the train was upon him. If there is any reasonable evidence of care on the part of the plaintiff in an action to recover damages on account of negligence, it is for the consideration of the jury. There was some evidence of care on the part of the deceased, because he looked in both directions when he started across the avenue, as well as when he was half way to the nearest track. There was no direct evidence that he listened, and there never can be when the subject of the accident is dead. Schafer *v.* Mayor, etc., 154 N. Y. 466, 472. It appears, however, that he was on the alert and using his eyes, which is some evidence, under the circumstances, that he was also using his ears. Moreover, the jury could have found that if he had listened he would not have heard the train, for there was no noise and no warning. Smedis *v.* B'klyn & R. B. R. R. Co., 88 N. Y. 13. They could also have found that if he saw the approaching engine he thought it was standing still, as the other witnesses did. It is difficult to tell, in the night-time, when the track is level and straight, whether the headlight on an engine is approaching, standing still or receding. As one of the witnesses put it, "at the rate of speed the train was running, when you see the headlight a block away you cannot pos sibly tell whether it is there or coming on." The passenger train on the north track, according to some of the evidence, did not reach the crossing until after the accident, and this would tend somewhat to divert the attention of a traveler upon the crosswalk. Under these circumstances, we think it was for the jury and not for the court to decide whether the deceased was guilty of contributory negligence. Kettle *v.* Turl, 162 N. Y. 255, 7 Am. Neg. Rep. 482; Zwack *v.* N. Y., L. E. & W. R. R. Co., 160 N. Y. 362, 6 Am. Neg. Rep. 669; Judson *v.* Central Vermont R. R. Co., 158 N. Y. 597, 6 Am. Neg. Rep. 167; McNamara *v.* N. Y. C. & H. R. R. R. Co., 136 N. Y. 650; Rodrian *v.* N. Y., N. H. & H. R. R. Co., 125 N. Y. 526; McClain *v.* B'klyn R. R. Co., 116 N. Y. 459; Greamy *v.* L. I. R. R., 101 N. Y., 419; Massoth *v.* Del. & Hud. Canal Co., 64 N. Y. 524; Noble *v.* N. Y. C. & H. R. R. R. Co., 20 App. Div. 40, s. c. 161 N. Y. 620, 630.

For these reasons we think the judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.

EHRHARD v. METROPOLITAN STREET RAILWAY COMPANY.

Supreme Court, New York, Appellate Division, First Department, February, 1901.

PASSENGER ALIGHTING OR FALLING FROM MOVING STREET CAR — WEIGHT OF EVIDENCE — VERDICT. — In an action to recover damages for injuries to plaintiff's intestate who was thrown or fell from an open street car of defendants, it appeared that she had intended to alight at a certain street but the car did not stop there and the accident happened after the car had passed the southerly crossing of said street, and before it reached the northerly crossing of the next street. The only evidence tending to show that plaintiff's intestate was thrown from the car through defendant's negligence was that of a witness who was sitting at the fourth-story window of a building over 100 feet away, who testified that he saw the car coming at a very rapid rate of speed; that as it approached plaintiff's intestate's street she signaled the conductor to stop the car; that it did not stop there, but came to a sudden jerk back farther south; that plaintiff's intestate was thrown off the car, and that after the accident the danger signal was given, and the car was stopped quickly. The conductor, three passengers, a policeman riding a bicycle just behind the car, and the motorman, all testified that there was no sudden jerk of the car until after the plaintiff's intestate had fallen from the car, and that the accident was not caused by defendant's negligence. Held, that the verdict for plaintiff was against the weight of evidence, and judgment should be reversed (1).

RUMSEY and MCLAUGHLIN, JJ., dissented, holding that the question of negligence was for the jury, which was properly decided by them.

1. For other actions relating to Accidents While Alighting from or Boarding Street Cars, Trains, etc., from the earliest period to 1897, see vols. 2–7 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topics, to date, are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Alighting from street car — Weight of Evidence — Damages — In RADJAVILLER *v.* THIRD AVENUE R. R. CO. *(Supreme Court, New York, App. Div., First Dept., February, 1901)*, 68 N. Y. Supp. 617, an action for damages for injuries sustained by plaintiff, a young woman eighteen years of age, while alighting from defendant's street car due to same being started as she was leaving the car, judgment for plaintiff for $1,400 was affirmed. On appeal, O'BRIEN, J., said: "It is insisted upon this appeal that the verdict is against the weight of evidence. The plaintiff, however, is corroborated by two witnesses, and, though her version is met by opposing testimony of at least three witnesses for the defendant, who testified that she stepped off the car while it was in motion, we do not think that the preponderance is so great that we would be justified in disturbing the verdict of the jury rendered upon conflicting testimony. It is admitted that, as the car approached 169th street, the plaintiff evidenced to

APPEAL from Trial Term, New York County.

Action by Louis Ehrhard, as administrator of the estate of Mary Ehrhard, deceased, against the Metropolitan Street-Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. *Judgment reversed.*

Argued before VAN BRUNT, P. J., and HATCH, RUMSEY, McLAUGHLIN and INGRAHAM, JJ.

CHARLES F. BROWN, for appellant.

CHARLES BULKLEY HUBBELL, for respondent.

INGRAHAM, J. — After the verdict in this case the defendant made a motion for a new trial, upon the ground, among others, that the verdict was contrary to the evidence. That motion was denied,

the conductor her intention to alight, and that she proceeded to the rear of the car, so as to be in readiness to do so when the car should stop at that street. At this point the conflict begins, the defendant's witnesses stating that, although the car did not stop at 169th street, the plaintiff deliberately stepped off and was injured; and, on the other hand, the plaintiff and her witnesses testifying that the car came to a stop at that place, and, without affording her an opportunity to alight in safety, it was suddenly started, throwing her to the ground, and causing the injuries described. Her story, supported, as it is, by other testimony, is equally as natural and probable as that of the defendant's witnesses; for, according to the latter, we must infer that the plaintiff deliberately stepped off the car while it was in full motion — a venture which even an active man, unincumbered by the apparel of a woman, could not make without the probability of being injured." On the question of damages the court held that certain testimony was admissible and that there was no error in the charge bearing on future pain and suffering, O'BRIEN, J., said: "Apart, however, from this discussion, we think there was here sufficient evidence from which the jury might infer future pain and suffering. Besides the description of her injuries, the plaintiff stated that, on the very day of the trial, she was still suffering from headaches, and from buzzing and pain in the ear, and her weight had been reduced from 140 to 120 pounds; and the physician testified that during the three weeks he was attending her he found, in addition to her other injuries, bleeding of the ear and swelling of the head, and the injuries to her head amounted to concussion of the brain. Unless it is assumed that the conditions which the plaintiff describes resulting from concussion of the brain, — headaches and pain and buzzing in the ear, — down to the time of the trial, should thereupon immediately cease, there was, we think, some evidence, though slight, upon the question of future pain and suffering. Whether there was or not, however, was left to the jury to determine; and the right, under the evidence, to present the question to the jury not having been called to the attention of the court, an exception to what was, as an abstract proposition of law, a correct rule of damages, presents no reversible error. That the defendant was in no way injured by what was said upon the subject of damages appears from the clear and able charge of the judge, which carefully eliminated every element of damage other than those for which recovery could be had. The verdict of $1,400 considering the extent and

and from the order entered thereon the defendant appeals. Upon this appeal, therefore, the question as to whether the verdict is against the weight of evidence is presented. The plaintiff's intestate, a passenger upon one of the defendant's cars, was thrown or fell from the car between Eighteenth and Nineteenth streets, in the city of New York, on June 26, 1898, and received injuries which resulted in her death. She was riding in an open car that was proceeding downtown. It would appear that she had intended to alight at Nineteenth street, but the car did not stop at that street, and the accident happened after the car had passed the southerly crossing of Nineteenth street, and before it had reached the northerly crossing of Eighteenth street. The only evidence tending to show that the plaintiff's intestate was thrown from the car through the negligence of the defendant was the testimony of one William J.

nature of the plaintiff's injuries, must be regarded as moderate and fair. We think that the judgment and order should be affirmed, with costs. RUMSEY and HATCH, JJ., concur. VAN BRUNT, P. J. (dissenting): I think it was error to leave to the jury the question of damages for future pain and suffering. There was no evidence to show what would be the probable duration of the pains, if they existed at the trial, and the jury were simply allowed to speculate upon this point. The question of future pain and suffering was left entirely to the imagination of the jury. There was no evidence to guide them. INGRAHAM J., concurs.

Alighting from street car — Sudden start—Damages—In FRENCH *v.* BROOKLYN HEIGHTS R. R. CO. *(Supreme Court, New York, Appellate Division, Second Dept., January 1901)*, 68 N. Y. Supp. 287, an action for damages for injuries to plaintiff, an old man, seventy years of age, while alighting from defendant's car, due to sudden starting of same, judgment for plaintiff for $400 was affirmed. WOODWARD, J., said: "The appellant practically concedes upon this appeal a liability, but urges that there was no evidence to warrant an award of $400, and that the trial court erred in refusing to inspect the plaintiff physically. The evidence, which is undisputed, shows that the plaintiff, a man seventy years of age, while attempting to get onto one of the cars of the defendant at the New York end of the Brooklyn bridge, was thrown down, and sustained a painful injury to his side, by the sudden starting of the car. Plaintiff was engaged in selling glassware on commission for several different houses, but there was no evidence of his earning power, except that it may be inferred from the testimony that he had been able to care for himself. After the accident he went to a hospital in New York, where the doctor prescribed the use of a liniment, and subsequently he entered the hospital of the Kings county almshouse, where he remained for a period of about two months, because, being unable to work, he had nowhere else to go. He testified that he was in pain at the time of the trial of the action from this injury, the trial occurring some three months after the accident. There was a conflict of evidence upon the question of whether the plaintiff's side showed a depression at the point of contact, indicating a continuation of the difficulty, and the amount of the judgment indicates that the trial court found in favor of the plaintiff's contention upon this point. Taking this view of the case, we are

Nixon, who at the time of the accident was seated at a window in the fourth story of the building at the southeast corner of Nineteenth street and Second avenue. The accident happened about ten or half-past ten o'clock in the evening. Nixon testified that he first noticed the car upon which the plaintiff's intestate was riding when it was about Twentieth street and Second avenue; that it was coming at a very rapid rate of speed, — from twelve to fifteen miles an hour; that he watched the car all the way down the avenue from Twentieth street; that when about twenty-five feet north of the drug store on the northwest corner of Nineteenth street he noticed the plaintiff's intestate signaling the conductor to stop the car; that the car did not stop at Nineteenth street, but when about twenty-five or thirty feet south of the corner of Nineteenth street the witness noticed that the bell was pulled, the car continuing, however, until it came to "a sudden jerk back," about twenty-five or thirty feet north of the corner of Eighteenth street, and when it came to a sudden jerk it threw the plaintiff's intestate off on her head, and then went on until the back fender of the car covered the Eighteenth street track; that the plaintiff's intestate sat on the third seat from the rear, with her hand on one of the supports of the roof. The witness testified, on cross-examination, that after the plaintiff's intestate was thrown he heard three bells from the car, called a "danger signal," to stop quickly; that from his position he could see the motorman upon the front platform of the car; that he saw him, after the signal bell was rung, turn his crank, and try to stop the car; that the car was full of people standing up inside of the car; that the house in which the witness was at the time had a store upon the first floor and three stories above, and was about thirty-five to forty feet from the ground. This testimony was the only evidence that the sudden stoppage of the car was before the plaintiff's intestate fell from the car. There was testimony of another witness, who was standing up in the car, that the car came to a sudden stop, and he was thrown violently forward on the other

not prepared to say that $400 is an excessive judgment, and we do not conceive it to be error on the part of the trial court to refuse to make examination of the plaintiff's person. The burden of establishing the injury was upon the plaintiff, and we are satisfied that there was evidence sufficient to support the decision of the court below, and that the defendant had no right to demand that the court examine the plaintiff to determine a dispute between opposing doctors. If there are any authorities in support of this contention, defendant's counsel have not called the attention of the court to them, and, in the absence of such authorities, the judgment of the court below should be affirmed. The judgment appealed from should be affirmed, with costs. All concur."

passengers in front of him. The witness testified that he heard a single bell ring, but did not hear the alarm bell ring, either before or after the accident; that he did not see the plaintiff's intestate fall from the car, and did not know whether the sudden stop came before or after the plaintiff's intestate fell from the car.

The sole ground upon which the jury could find that the defendant was guilty of negligence was that this sudden stopping of the car occurred before the plaintiff's intestate fell. The plaintiff's whole case, therefore, depends upon the correctness of Nixon's testimony that the plaintiff's intestate fell at the time of the jerk of the car caused by the quick stoppage of its motion. In considering the credibility of this testimony, we have to consider that the time of the accident was between ten and half-past ten o'clock at night, about midway between the two electric lights, one on the corner of Eighteenth street and the other on the corner of Nineteenth street, and that Nixon was in the fourth story of the building, from 130 to 150 feet away from the car, at the time of the accident, and was, without any particular reason, closely watching the car. The impression of a witness seeing an accident of this kind, even when testifying in entire good faith as to the transaction, is not always accurate as to the sequence of events occurring within a few seconds of time, in a moment of excitement caused by the happening of such an accident. There was no reason suggested for the sudden stoppage of the car between the two streets. The way was perfectly clear; nothing to call for the application of the brake at this particular place. There was no evidence to show that the motorman was not competent to run the car, or that he was not attending to his duty. Immediately upon the woman's falling from the car he received this danger call, which required him to stop as quickly as possible. Considering the evidence offered by the defendant, the probabilities are strongly in favor of the car's having been quickly stopped after the danger signal was given, which all the witnesses who saw the accident except Nixon united in saying was given after the woman fell from the car. It is a little difficult to see how Nixon could have seen all that he testified to from the position in which he was placed. The car was quite full of passengers, with people standing up inside. It would appear to have been almost impossible for Nixon to see the motorman at the time of the accident, when the car was over 100 feet away from him, unless he was able to look through the roof of the car, or through the passengers standing up in the car; but assuming that Nixon did see the occurrence, and did testify as to the impression that it made upon him, it is probable that he was mistaken, and that the sudden stoppage of the car was after, and not before, the plaintiff's intestate fell.

The defendant called the conductor of the car. He testified that after the car left Nineteenth street the speed of the car was reduced, and that suddenly the plaintiff's intestate stood up, and then fell off the car; that she had not indicated any request to stop the car, and the witness had not given any signal for that purpose; that immediately after she fell off a passenger of the car rang the bell three times, and in response to these three quick bells the motorman stopped the car right away; and that before the woman fell there was no jerk of the car. The defendant also called three passengers who were upon the car at the time of the accident. They were apparently disinterested witnesses, and corroborated the testimony of the conductor. They testified that the plaintiff's intestate was seated in the car; that she arose from her seat, and immediately afterwards fell off the car; that when she fell there was no jerk or sudden stoppage of the car; and that it was immediately after her fall that the car suddenly stopped. These passengers were all in a position to see the occurrence just as it happened. The defendant also called a policeman, who was riding a bicycle. He testified that he was about five or six feet from the car at the time of the accident; that when he first observed the car he was riding north on the right-hand side of the avenue, and he made up his mind to change, and go south to the lower portion of his post; that he waited for the car to pass, and then passed around behind the car, to come in the car track; that he followed the car, about six or eight feet behind it, until it was within sixty or seventy feet of Eighteenth street, when he saw a woman stand up and fall out of the car; and that there had been no stoppage of the car before she fell. The witness' post was on Second avenue, from Houston to Twentieth street. He was then engaged in covering his post, having come from the southerly portion of it to the northerly. He noticed the woman stand up, and immediately after fall out sideways. The defendant also called the motorman, who testified that, as he was going between Nineteenth and Eighteenth streets, he got one bell in the middle of the block; that in response to that signal it would be his duty to stop on the south side of the crossing, and he then threw off his power, and "let the car drift;" that from the middle of the block down to Eighteenth street the car was running without power; that afterwards he got three bells, and then stopped the car within thirty feet; that these three bells indicated that he was to come to an instant stop, and that he did make a sudden stop; and that prior to getting the three bells there was no jerk of the car. This evidence clearly explains the nature of the accident, and is entirely consistent with that of the plaintiff's

witnesses, with the single exception of Nixon, that the sudden stoppage of the car was after, instead of before, the plaintiff's intestate fell; and considering the position of Nixon, the improbability of his ability to clearly see the events that led up to the accident, the absence of any notice of the motorman to stop the car prior to the accident, and the testimony of the other witnesses, it seems to me perfectly clear that Nixon was mistaken in his testimony, and that the verdict was against the weight of evidence.

It follows that the judgment and order must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., and HATCH, J., concur.

RUMSEY and MCLAUGHLIN, JJ. — We think there was a plain question for the jury, which was properly decided by them. We therefore dissent.

GAMBLE v. AKRON, BEDFORD AND CLEVELAND RAILROAD COMPANY.

Supreme Court, Ohio, November, 1900.

PRACTICE — JUDGMENT — REVIEWAL — CONDUCTOR ACTING AS MOTORMAN KILLED IN COLLISION — EMERGENCY — CONTRIBUTORY NEGLIGENCE. — 1. Where it affirmatively appears that the Circuit Court reversed the judgment of the Court of Common Pleas for errors of law only, its judgment of reversal will be reviewed by the Supreme Court. Wetzell *v.* Richcreek, 53 Ohio St. 62, approved and followed.

2. Where a conductor on an electric car, who is also a competent motorman, temporarily exchanged places with the motorman, there being at the time no apparent danger of accident, to enable the latter to eat his dinner, and, while the conductor was running the car, a collision occurred with a snowplow running around a curve in the opposite direction, solely through the fault of the defendant's train dispatcher, fatally injuring the conductor, the latter is not chargeable with contributory negligence merely by being in the place of the motorman and standing at his post while endeavoring to avert the impending collision.

(Syllabus by the Court.)

ERROR to Circuit Court, Summit County.

Action by one Gamble, administrator of J. H. Walborn, against the Akron, Bedford and Cleveland Railroad Company. Verdict for plaintiff was reversed by the Circuit Court, and he brings error. *Judgment of Circuit Court reversed; that of Common Pleas affirmed.*

The plaintiff in error brought suit in the Court of Common Pleas to recover for the death of Justus H. Walborn, who was a conductor

on the defendant's railroad. On the day of his death the train dispatcher of the defendant ordered him to take his car and proceed northward from Akron to Vier's switch. The train dispatcher had forgotten, when he gave this order, that he had already ordered a snowplow to proceed southward from Bedford station to Harlow's siding, a point several miles south of Vier's switch. A collision resulted, and Walborn was fatally injured. After his car left the power house on its trip northward, the decedent took up the fares of passengers, and then, requesting the motorman to eat his dinner at the rear end of the car, and watch the trolley in the meanwhile, took charge of the controller, and ran the car until the motorman had finished eating. About this time the motorman went forward, and stood near the entrance of the vestibule from two to five minutes, when the snowplow appeared, coming in the opposite direction around the curve. The motorman retreated from his position, and the decedent stood at his post, and at once reversed the car, when the circuit breaker overhead flew out. He replaced it, and held it in its place with one hand, and continued to keep the car reversed until the collision occurred. The trial in the Court of Common Pleas resulted in a verdict for the plaintiff. Motion for a new trial was overruled, and judgment entered upon the verdict.

The Circuit Court reversed the judgment of the Court of Common Pleas upon the following findings of error: "1. That under the evidence in this case it was the duty of the court to have said absolutely to the jury that the rules printed in the red book, so far as they were introduced in evidence before the jury, and also Exhibit 2 appearing in the bill of exceptions, bearing date October 4, 1896, were rules of the Akron, Bedford and Cleveland Railroad Company governing the conduct and specifying the duties of motormen and of conductors in running and operating said company's cars, and the court erred in submitting to the jury the question of whether or not those were rules of the defendant company. 2. Under the evidence in this case it was the duty of the trial court to say to the jury that there was no evidence in the case tending to show any abrogation or waiver of the said rules, and the court erred in omitting to so charge the jury. 3. Said Court of Common Pleas erred in charging the jury that it should determine whether or not the said Akron, Bedford and Cleveland Railroad Company had rules. 4. Said Court of Common Pleas erred in charging the jury that there was evidence tending to show that the rules of the company had been abrogated, and strict performance thereof waived, and erred in submitting that question to the jury. 5. Said Court of Common Pleas erred in submitting to the jury the question as to

what were the rules of the said Akron, Bedford and Cleveland Railroad Company. 6. The Court of Common Pleas charged the jury as follows: 'Did the deceased know, or have the opportunity to know or be informed, as to the nature and extent and character of the rules?' This was error, and under the evidence the court should have charged that said Walborn did know of the existence of said rules and their contents. 7. Said Court of Common Pleas erred in submitting to the jury the question as to whether Justus H. Walborn, decedent, violated the rules of the company. 8. Said Court of Common Pleas erred in submitting to the jury the following question: 'Did the decedent, at the time and on the day of this accident, violate these rules, or any of them?' whereas, under the evidence in said case, it was the duty of the court to say to the jury that the deceased did go into the vestibule of the car, and did violate the rules of the company in respect thereto. 9. Said Court of Common Pleas erred in submitting to the jury the following question: 'Did such violation on his part, if it is shown that the rule was violated, help to produce or proximately cause the injuries which he received on that day?' whereas it was the duty of the court to say to the said jury that the vestibule of said car was a place of known greater danger than the conductor's post of duty in the rear of the car, as fixed by the rules of the company, and that his voluntary act of going into said vestibule and taking upon himself the management of the motor was an act of negligence upon his part contributing to the injuries sustained by him, which resulted in his death. 10. Said Court of Common Pleas erred in refusing to charge the jury as requested by the defendant below in its requests Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, respectively, appearing in the bill of exceptions. 11. Said Court of Common Pleas erred in adding the modifications to defendant's requests Nos. 3, 4, 5, 6, 7, and 8, respectively, as appears in the bill of exceptions. 12. Said Court of Common Pleas erred in charging the jury by giving requests Nos. 1 and 3 of plaintiff below. 13. The entire charge of the court below was misleading, in that it necessarily would lead the jury to the proposition that if the decedent, when he was in the vestibule, and running the motor, did nothing to bring the cars together, and was not an active agent in the collision, that the plaintiff might recover. 14. Said court erred in its charge to the jury in defining negligence as follows: 'It consists of some act or omission of duty that, in the natural and ordinary course of events, might cause all the injury complained of;' and in saying to the jury: 'It is a question of fact for you to determine from all the evidence and circumstances of the case whether Walborn's conduct on the day and

at the time of the occurrence of this injury constituted negligence, or the want of ordinary care, as I have defined that.' "

GRANT & SIEBER and ROWLEY & BRADLEY, for plaintiff in error.

FORD, SNYDER, HENRY & MCGRAW and ALLEN & COBBS, for defendant in error.

DAVIS, J. (after stating the facts). — It is said that this is a case in which one ground of reversal may have been that the judgment was against the evidence, and that, therefore, the judgment of the Circuit Court should not be reviewed in this court. Dougherty *v.* Railway Co., 56 Ohio St. 725, 49 N. E. Rep. 1109. Whatever the Circuit Court might have done, it is very clear that it did not reverse the judgment of the Common Pleas on the weight of the evidence; for every one of the fourteen findings of error relates to the charge to the jury, or that which, it is claimed, should have been given in charge to the jury, in regard to the alleged violation of the rules of the company. Inasmuch as the Circuit Court must pass on all errors assigned, it must be presumed that the court found no errors except those specified. Hence we are not justified in assuming that considerations of the weight of the evidence entered into the judgment of reversal. Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. Rep. 1004.

We do not adopt the theory which seems to have prevailed in the Circuit Court. Rule three for conductors merely defines the regular position of the conductor when not collecting fares. It does not prohibit him from temporarily occupying any other position. By general rules four and eleven he has full charge of the car while in service, and this implies that he may be anywhere in the car while in the performance of duty. In an emergency — such as, for example, an accident to, or sudden illness of, the motorman — he might be in the vestibule in the place of the motorman, and, if competent to do so (as it appears that Walborn was), might act as motorman. So far as appears here, there was no violation of either the letter or the spirit of these rules, construed together, when Walborn temporarily exchanged places with the motorman in order that the latter might eat his dinner. It does not appear that the company's property or the safety of passengers was in any way imperiled by this arrangement, and there was no occasion to apprehend an emergency which would call for them to be in their respective places. It would seem that in this instance the conductor exercised his judgment and authority, under the rules, reasonably and prudently. The case is not, therefore, akin to those cases in which a servant voluntarily and needlessly, and not in the performance of duty to the master, places himself in a position of greater peril.

But, if it be conceded that Walborn was in a prohibited position at the time he was fatally injured, it seems to us that the same result must be reached. The blunder of the train dispatcher put everybody on the car in peril. His act was the sole and proximate cause of the collision. Not a thing that Walborn did contributed to bring about the collision, and he heroically died at his post in trying to prevent it. Nothing is alleged against him, except that he was in the most dangerous position, where all were in common danger, without the fault of any. Under such circumstances it is nothing short of absurdity to contend that, because he was killed instead of another, or possibly all, the company should escape all liability for its wrong. But it is argued that he should have deserted his temporary post, and have gone back to his proper position; in other words, that he was negligent in remaining. But, if he had run away without attempting to reverse, and the other people on the car had been killed or mangled, would any court acquit the company of negligence in that respect? If the contention of counsel is correct, it involves the contradiction that Walborn was negligent in remaining, and would have likewise been negligent if he ran away. Who, among us, is sufficient for the decision of such things in an emergency? We are not willing to accept it as the law that a motor engineer or a locomotive engineer is guilty of contributory negligence merely because he remains in his dangerous position, and continues his efforts to avert calamity from the passengers behind him. Beach, Contrib. Neg., sec. 42. And Walborn was, for the time being, the motor engineer of that car, and as such responsible for the safety of the passengers being carried therein. We find no prejudicial error in the record. It was hardly necessary to have bothered with the elaborate charge and requests to charge in this case. Upon the evidence in the case the court would have been justified in directing a verdict for the plaintiff.

The judgment of the Circuit Court is reversed, and that of the Common Pleas affirmed.

BUMBEAR v. UNITED TRACTION COMPANY.

Supreme Court, Pennsylvania, January, 1901.

RIDING ON STEP OF OPEN STREET CAR — PASSENGER STRUCK BY WAGON — EVIDENCE. — Where plaintiff got on the side step of an open street car, and while so riding was struck by the hub of a wheel of an ice wagon, which was so near the track as to project over the side step of the

car, and it appeared that the motorman could have seen the wagon a square from it, and was signaled by the man in charge of it to stop, but he went on without slackening speed, and the presence of the ice wagon was to be expected, against the danger of which it was the motorman's duty to guard. *Held*, that the evidence was for the jury, and judgment of compulsory nonsuit was reversed (1).

DANGEROUS PLACE ON STREET CAR—KNOWLEDGE OF CONDUCTOR. — Where plaintiff was received as a passenger on defendant's open street car when the car was so full that he could not go inside, and stood on the step with the knowledge and assent of the conductor, he could assume that reasonable precautions would be taken to protect him from such dangers as could be readily seen and guarded against.

APPEAL from Court of Common Pleas, Allegheny County.

Action by Andrew Bumbear, Jr., by his father and next friend, against the United Traction Company. There was a compulsory nonsuit, which the court refused to take off, and plaintiff appeals. *Judgment reversed.*

A. BLAKELEY, for appellant.

KNOX & REED and J. H. BEAL, for appellee.

FELL, J. — Generally, it is the duty of a passenger to go inside the car. In the use of the cars of steam railroads the rule admits of no exception which does not rest on necessity. Camden & Atl. R. R. Co. *v.* Hoosey, 99 Pa. St. 492 (2); Railroad Co. *v.* Greiner, 113 Pa. St. 600, 6 Atl. Rep. 246. While it is not *per se* negligent for a passenger on a car of a horse railway to stand on the platform or steps, it is his duty to go inside the car if there is room. Germantown Pass. R'y Co. *v.* Walling, 97 Pa. St. 55 (3); Mann *v.* Phila. Traction Co., 175 Pa. St. 122, 34 Atl. Rep. 572 (4). As to the

1. For other actions arising out of Accidents, similar to the case at bar, see vols. 9 and 10 Am. Neg. Cas., where the same are chronologically grouped, from the earliest period to 1897, and arranged in alphabetical order of States. Subsequent actions to date appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

Passenger injured stepping down from car as train was approaching station — Contributory negligence. — In COBURN *v.* PHILADELPHIA, WILMINGTON AND BALTIMORE R R. Co. *(Pennsylvania, February, 1901)*, 48 Atl. Rep. 265, it was held that a passenger on a train was guilty of contributory negligence in stepping down from a car without looking as the train approached the station, which car instead of having three steps had only two, and as plaintiff put his foot where he thought the third step was, down he went and was run over, and judgment for defendant was affirmed.

2. Camden & Atl. R. R. Co. *v.* Hoosey, 99 Pa. St. 492, is reported in 10 Am. Neg. Cas. 198.

3. Germantown Passenger R'y Co. *v.* Walling, 97 Pa. St. 55, is reported in 10 Am. Neg. Cas. 112.

4. Mann *v.* Phila. Traction Co., 175 Pa. St. 122, is reported in 10 Am. Neg. Cas. 120.

danger of riding on platforms or steps, electric trolley cars occupy an intermediate position, and the established rules in regard to steam and horse cars do not apply to them without modification. Reber *v.* Pittsburg & B. Traction Co., 179 Pa. St. 339, 1 Am. Neg. Rep. 181, 36 Atl. Rep. 245; Thane *v.* Scranton Traction Co., 191 Pa. St. 249, 6 Am. Neg. Rep. 185, 43 Atl. Rep. 136. In the case last cited it was held that where there is room to be seated inside the car, and no special and sufficient reason is shown why a passenger should not avail himself of it, it is negligence *per se* to remain on the platform of a moving trolley car. In the opinion it was said by our Brother MITCHELL: "The proper and assigned place for passengers is inside the car. Unless he shows some valid reason to excuse him, a passenger is bound to put himself in the appointed place, and if he does not he takes the risk of his location elsewhere." The side steps of an open summer car are not intended for the use of passengers, except as a means of ingress and egress. Their use for riding differs, in point of danger, but slightly from the use of the bumper, which is *per se* negligent. Bard *v.* Penn. Traction Co., 176 Pa. St. 97, 34 Atl. Rep. 953 (1). And it is so manifestly dangerous as generally to defeat any claim for injuries. A passenger who rides on them when it is reasonably practicable for him to go inside the car assumes all the risks of his position, and in all cases he assumes the risk incident to the usual swaying and jolting of the car, and from collision with passing vehicles, and with obstructions, of whatever nature, which unexpectedly appear. These are dangers which cannot be guarded against by the careful and prudent management of the car. But when the passenger, by invitation of the conductor, or with his knowledge and assent, and from necessity, because of the want of sitting or standing room inside the car, rides on the side steps, he is entitled to the same degree of diligence to protect him from dangers which are known and may readily be guarded against as other passengers.

It appeared from the testimony in the case that the plaintiff got on the side step of an open car to ride to his work, at a place where he had taken the cars every morning for several weeks before. The car, as usual, was full, and there was not standing room inside or on the platform. He stood, as usual, on the side step, which was filled with passengers. The conductor received his fare, and made no objection to his standing on the step. At a place where the street curved, the railway tracks were so near one side as barely to leave room for a wagon to stand between them and the walls of a

1. There is a note of Bard *v.* Penn. Traction Co., 176 Pa. St. 97, in 10 Am. Neg. Cas. 126.

hotel building. At this place each morning during the summer ice wagons stood while ice was delivered at the hotel. On the morning of the accident the hub of a wheel of an ice wagon was so near to the tracks as to project over the side step of the car. The motorman could have seen the position of the wagon when a square from it, and he was signaled by the man in charge of the wagon to stop. He went on without slackening the speed of the car, and the plaintiff was injured by the hub of the wheel striking him. There was an offer by the plaintiff, which was rejected, to prove that every morning during the summer the men in charge of the wagons gave notice to the men in charge of the defendants' cars as they approached the place in order that time should be given to draw the wagons out and let the cars pass in safety. Under this testimony, the case was clearly for the jury. As the plaintiff was received as a passenger when the car was so full that he could not go inside, and stood on the step with the knowledge and assent of the conductor, he could assume that reasonable precautions would be taken to protect him from such dangers as could be readily seen and guarded against. The presence of the ice wagons in the narrow space between the tracks and the walls of the hotel was to be expected at about the same time every morning. It was a known danger, against which it was the duty of the motorman to guard. Moreover, he had express notice of it on the morning of the accident.

Judgment is reversed, with a *procedendo.*

ENRIGHT ET AL. V. PITTSBURG JUNCTION RAILROAD COMPANY.

Supreme Court, Pennsylvania, January, 1901.

BOY JUMPING FROM MOVING TRAIN — THREATS OF BRAKEMAN. — Where a boy, ten years old, jumped on a freight train of defendant, and being frightened by the conduct of defendant's brakeman in threatening him to get off, attempted to get off the train while it was moving rapidly and was seriously injured, it was held that the act of the brakeman was negligent and it was error to grant compulsory nonsuit (1).

1. For other actions relating to Ejection of Passengers and Trespassers from Trains, etc., from the earliest period to 1897, see vol. 8 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions to date appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

TRESPASSER ON TRAIN — EJECTION — DUTY OF RAILROAD COMPANY. — Where a child rides on a train as a trespasser, it is the duty of the railroad company and its employees not to eject him from the train, or cause him, by fright or fear, to leave the train while in rapid motion, so as to endanger his life or limb, and a failure to observe such duty is negligence.

APPEAL from Court of Common Pleas, Allegheny County.

Action by Patrick Enright, in his own right, and Joseph Enright, by his next friend, against the Pittsburg Junction Railroad Company. From a judgment for defendant, plaintiffs appeal. *Judgment reversed.*

T. T. DONEHOO and HORACE J. MILLER, for appellants.

JOHNS MCCLEAVE, for appellee.

MESTREZAT, J. — Joseph Enright, a boy of ten years, in company with two other boys, boarded a freight train on defendant's road while it was standing at the foot of Fortieth street, in the city of Pittsburg, on the afternoon of the 5th day of September, 1897. They got on a Pittsburg and Western iron flat car located about tne middle of the train. A Baltimore and Ohio engine pulled the train, and an engine of the defendant company pushed it. A brakeman saw the boys get on the train, but at that time did not offer to put them off. The destination of the boys was Schenley Park, to see the goat races. After the train had stopped at the foot of Fortieth street long enough to attach the pushing engine, it started south in the direction of Schenley Park. When it emerged from the tunnel at or near the park, Joseph's companions jumped off. The train then was going pretty fast, and for that reason the boy did not wish or intend to attempt to get off. At that time the brakeman who was on the train, and two cars from Joseph, waved a stick and hallooed at him, "Here comes the detective!" The boy, being frightened by the conduct of the brakeman, left the car on which he was riding, and got on the bumper between it and the car next in front of it. After he did so the brakeman again waved his stick at him and hallooed, "Here comes a detective!" The boy then, through fear, attempted to get off the train while it was moving rapidly, and, falling under the wheels of the car on which he had been riding, was seriously injured. His right leg was taken off and his left leg was badly lacerated. Such, briefly stated, are the facts of the case as disclosed by the testimony. The learned judge of the court below granted a compulsory nonsuit, and subsequently refused to take it off, for the reason, as stated in his opinion, that "this case is ruled by the case of Cauley *v.* Pitts., Cin. & St. L. R'y Co., 98 Pa. St. 498" (1). We must, therefore, assume that

1. There is a note of Cauley *v.* Pitts., Cin. & St. L. R'y Co., 98 Pa. St. 498, in 10 Am. Neg. Cas. 215.

the court below held that the action of the brakeman resulting in the injury of Joseph Enright was not negligence for which the defendant company was liable.

The liability of the defendant in this action depends upon the question whether it owed a duty of ordinary care and prudence to the plaintiff's son under the circumstances of the case, and whether it exercised such duty. If no obligation of that character rested upon the defendant, then it is exonerated from any liability for the action of its employee in causing the boy to place himself in a perilous position, which resulted in his injury. The testimony, which we must assume to be true, establishes the fact that the boy was frightened by the brakeman, so that he attempted to get off the train before he otherwise would have done so. The defendant's employee, therefore, while in the line of his duty, caused the boy to make an attempt to leave the train while it was moving rapidly. This act occasioned the injury to the plaintiff's son. Was it negligence? The solution of this question will determine the correctness of the judgment of the court below. If the position assumed by the court and urged by the appellee's counsel be correct, then a railroad company owes no duty whatever to a person of any age who enters upon one of its trains as a trespasser. The company, under such circumstances, may with impunity at any time eject a person from a train at the peril of life and limb. Its employees may throw the trespasser from the train, though death necessarily results from their action. The child of tender years, whose discretion cannot protect him, — as in this case, — who has entered its train with the knowledge and without objection of the brakeman, may be cast from the train with impunity while its rapid speed insures the greatest danger. Such is the logical conclusion from the rulings of the court below. We cannot assent to a doctrine fraught with so much danger to the public, and with so little regard for the rights of the individual. As said by Mr. Justice Gordon in Biddle *v.* Hestonville, Mantua & F. Pass. R'y Co., 112 Pa. St. 551 (1), "it would so illy accord with Christian civilization as to render its maintenance impossible." It cannot be supported by reason. It ignores a duty owed by a man to his fellow-men in civilized society. It repudiates an obligation resting alike upon the individual and the corporation. The plaintiff's son was a trespasser upon the defendant's train. He had no right to be there, and the brakeman would have been justified in expelling him. The defendant owed no duty to carry him in safety to his destination, or to

1. There is a note of Biddle *v.* Hestonville, Mantua & Fairmount Pass. R'y Co., 112 Pa. St. 551, in 10 Am. Neg. Cas. 133.

surround him with safeguards to protect him from falling from the train while in motion. He was not a passenger, nor entitled to protection as such. The defendant was not required to stop its train to permit him to alight, nor to run the train at any particular speed to suit the boy's convenience, or for his safety. No duties of this character devolved upon it. But, conceding this to be true, it does not follow that the defendant, by its employees, could eject the boy from the train, or cause him, by fright or fear, to leave the train while in rapid motion, so as to endanger his life. The child being on the train, and it running at a rapid speed, it became the duty of the defendant and its employees not to eject him. This duty arose from the circumstances. The failure to observe it was "a want of ordinary care under the circumstances," which is negligence. The brakeman knew the train was in motion, and hence saw the danger which must result from his conduct if the boy attempted to leave the train. His act was done, therefore, with full knowledge of the peril in which it placed the child. Consequently, the defendant, through its employee, disregarded a plain duty, which resulted in the painful and serious injury of the plaintiff's son.

The simple proposition to be determined here is the right of the defendant, by its employee, to endanger the life of a child of tender years by compelling him to alight from a freight train while it is moving at a rapid speed. The boy was not injured by reason of the dangerous position in which he placed himself, but because of the careless and reckless act of the brakeman in causing him to alight while the train was in motion. The cause of the boy's injury, therefore, is directly attributable to the negligent act of the defendant's employee in frightening him so that he attempted to quit the train in the face of imminent danger. We think the defendant company was negligent, and should answer for its conduct. This position is sustained by many decisions of this court. In Biddle *v.* Railway Co., *supra*, Mr. Justice Gordon, delivering the opinion, says: "That the defendant's driver or conductor was grossly negligent in compelling a child of twelve years of age to jump — and that backwards — from the platform of a moving car, no one can well deny. It was a mistake to hold that, because the child was a trespasser, it could, therefore, be ejected in a manner which endangered its life or limb. In the case of Pennsylvania Co. *v.* Toomey, 91 Pa. St. 256 (1), we held, *per* Mr. Justice Mercur, that such a disposition of a trespassing adult could not be allowed; and that ordinary care must be used to avoid injury even to a trespasser

1. Penn. Co. *v.* Toomey, 91 Pa. St. 256, is reported in 8 Am. Neg. Cas. 613.

is fully established by the cases of Railroad Co. *v.* Lewis, 97 Pa. St. 33, Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332, and Railroad Co. *v.* Hummell, 44 Pa. St. 375." In Arnold *v.* Railroad Co., 115 Pa. St. 140, 8 Atl. Rep. 213, it is said: "But the second rule to which we have adverted is that even a trespasser cannot be ejected from a train without a reasonable regard for his safety. This rule, as stated by Mr. Justice Hunt in the case of Railroad Co. *v.* Stout, 17 Wall. 657, is as follows: Whilst a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts. And this same doctrine has been approved by our own authorities [citing them]. If, then, we assume that the plaintiff was a trespasser, still the defendant had a duty to perform with reference to his safety which it was not at liberty to neglect; hence the court erred in directing a nonsuit." In Barre *v.* Reading City Pass. R'y Co., 155 Pa. St. 173 (1), the court says: "Assuming as a fact the defendant's allegation that plaintiff was a trespasser, that would not justify the driver in removing her from the rapidly moving car so forcibly and with such utter disregard for her personal safety. If the testimony was believed — as it must have been — by the jury, the driver was fully aware of the plaintiff's situation, and how she was sustaining herself, and he could not have been ignorant of the fact that she was a child of tender years. Knowing all this, he was at least bound to exercise such care in putting her off as not to endanger her life or limbs. Even trespassers are entitled to humane consideration; but plaintiff's youth exempted her from the charge of being a trespasser, in the legal signification of the word."

The learned counsel for the appellee contends that the facts of this case bring it within the decisions of the court in Flower *v.* Railroad Co., 69 Pa. St. 210; Railroad Co. *v.* Schwindling, 101 Pa. St. 258 (2), and Cauley *v.* Railway Co., 95 Pa. St. 398 (3). It is, therefore, necessary to briefly refer to these cases, and see what they decide. In Flower *v.* Railroad Co., a boy, who was standing on the platform of a water tank, was requested by the fireman, who was acting as temporary engineer, to put in the hose, and turn the water on the engine tank. He climbed up the side of the tender to put in the hose, and as he did so some detached freight cars belonging

1. There is a note of Barre *v.* Reading City Pass. R'y Co., in 8 Am. Neg. Cas. 618.

2. There is a note of the Schwindling Case in 10 Am. Neg. Cas. 103.

3. A note of the Cauley Case appears in 10 Am. Neg. Cas. 215.

to the train ran down without any brakeman, and struck the car behind the tender, driving the tender and engine forward. The boy fell from the tender, and was killed. In the opinion of the court, by Mr. Justice Agnew, it is said that the case turned "wholly on the effect of the request of the fireman, who was temporarily engineer, to put in the hose and turn on the water." It was, therefore, held that, it not being in the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendant was not liable. In Railroad Co. *v.* Schwindling, a boy of five or six years went upon the platform of a railroad station for his own amusement, and, while standing on the edge of the platform, looking at an approaching train, was struck and injured by an iron step which was bent and projected a few inches from the car of a passing train. The boy was told to step back from the position he occupied on the platform, but he refused to do so. Upon the authority of Gillis *v.* Penn. R. Co., 59 Pa. St. 141 (1), it was held that under these facts there could be no recovery, and that "the controlling feature of the inquiry in all such cases is, was there a duty to the plaintiff which was violated by the defendant? If there was not, there was no legal liability." We think it apparent that the two cases just referred to do not sustain the contention of the appellee. The facts clearly distinguish them from the one at bar. It must be conceded that Cauley *v.* Railway Co., *supra*, supports the position of the appellee. It was before the court twice, and is reported in 95 Pa. St. 398, and 98 Pa. St. 498. Both opinions were written by the same justice, and from both judgments two justices dissented. The opinion in the first report of the case is broader, and goes much further, than the syllabus, in which there is nothing that conflicts with the views expressed in this opinion. The second opinion reiterates the views enunciated in the first opinion. We have examined carefully the decisions of this court cited in both opinions, and are convinced that they do not sustain the conclusion of the court on the facts disclosed in the Cauley Case. We do not think the doctrine announced in the opinions filed in that case is supported by reason or authority, and, in so far as it conflicts with the views herein expressed, the case is overruled. It follows that the learned judge of the court below was in error in withdrawing the case from the jury, and hence the assignments of error must be sustained.

The judgment is reversed, and a *procedendo* awarded.

1. Gillis *v.* Penn. R. Co., 59 Pa. St. 141, is reported in 10 Am. Neg. Cas. 61.

CUNNINGHAM v. FORT PITT BRIDGE WORKS.

Supreme Court, Pennsylvania, January, 1901.

MASTER AND SERVANT — EMPLOYEE KILLED — WARNING OF DANGER. — Where a number of large and unwieldy iron beams were being shifted into position by plaintiff's intestate and other employees, and one of the beams fell on the deceased, it was held that there was no hidden or latent danger that required instruction to avoid and defendant was not liable for the accident.

DEFECTIVE APPLIANCE — MASTER NOT LIABLE. — A master is not responsible for defects in the construction of skids used in shifting iron beams, where the materials were selected and the skids built by the shipping gang, of which deceased was a member, under general orders from the superintendent, which did not limit the materials or mode of construction (1).

APPEAL from Court of Common Pleas, Washington County.

Action by Annie Cunningham, administratrix of James E. Cunningham, deceased, against the Ft. Pitt Bridge Works. From judgment for plaintiff, defendant appeals. *Judgment reversed.*

JOHN D. BROWN and JOHN W. & A. DONNAN, for appellant.

ALBERT S. SPROWLS and BRADEN & CAMPBELL, for appellee.

MITCHELL, J. — The facts as to how the accident occurred are practically undisputed. A number of iron flooring beams had been stored on one end of a pair of skids, and it was desired to move

1. For other actions between Master and Servant Arising out of Accidents from Defective Appliances, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

Employee Injured — Defective appliance. — In DYER *v.* PITTSBURG BRIDGE CO. *(Pennsylvania, January, 1901).* 47 Atl. Rep. 979, judgment for plaintiff, an employee injured while at work on a bridge, was affirmed. The material facts of the case are as follows: "James Dyer, the plaintiff in this case, was a young man who had been working, prior to the accident complained of herein, about three years at the bridge-building business. Derricks similar to the one on which he was hurt had always been used, and in his examination on the trial of this case he showed a thorough and complete knowledge of the purposes and uses of a derrick. In March, 1897, he was working on a bridge which was being built near Glenwood, in the city of Pittsburg, for the Baltimore & Ohio Railroad Company. The allegation is that this bridge was being built by the Pittsburg Bridge Company. He was standing upon one of the abutments waiting to guide one of the trusses, which was being hoisted, to place. The derrick had been fitted up for the purpose of elevating these trusses. One truss had been placed in position, and another was being hoisted, when a bolt which

them to the other end. They were some thing less than a ton each in weight, large and unwieldy in shape (being about fourteen feet long, and from five to ten feet high), and stood upon edge on a flange which gave a base of five to seven inches according to different witnesses. There were eighteen of them in all, and to secure them in place they had been tied with rope to two upright pieces or standards at the end of the skids. They were moved by untying each one in succession and sliding it separately along the skids by hand, — "inching" it, as one witness called it. Twelve of them had been safely shifted in this manner, and the thirteenth was being moved, when, from some cause not explained, one or more of the five which still remained, and which had only been tied

goes through the top of the mast, and holds the gudgeon pin in place, broke, and released the gudgeon pin, and let the arm of the derrick fall. The ropes, in running, caught his foot, and practically sawed it off. He was one of quite a number of men, all of whom testified that the head of the mast of the derrick was out of repair, and that several attempts were made to fix up the gudgeon pin by driving in pieces of iron. All the men on the job testified that the condition of the derrick was open and apparent to every one on the work prior to the happening of the accident. The testimony showed that the bolt when put in was in good condition, that it was open to inspection, and that it could have been inspected by the workman, and that it should have been inspected, and that there were numbers of such bolts provided by the company to be used for this express purpose. Counsel for the defendant, at the trial of this cause, submitted to the court a point for binding instructions, which was refused, and the case submitted to the jury on the question of whether or not the defendant company was negligent in not providing suitable appliances for doing the work. The derrick, so far as appears in the testimony, had not been inspected by the company, or any one representing it, from the time that it had been erected. Dyer did not assist in the erection of the derrick, and was engaged at other work on the bridge, which was being erected, and the gudgeon pin was not securely fastened in the mast, by reason of not having proper wedges with which to fasten or key it up, and the head of the mast had rotted out, and had become defective. The gudgeon pin, which was held in place by a pin which passed clear through the mast, was old, and much worn, by reason of the defective condition of the mast, and the consequent looseness of the gudgeon pin. Dyer, the plaintiff, was called to put one of the girders in place when it was swung around by the derrick. Just as he was about to guide it into place, the bolt holding the gudgeon pin broke, and the gudgeon pin flew out, and the whole derrick collapsed." *Held*, that the case was properly submitted to the jury, and judgment for plaintiff affirmed.

Employee unloading derrick — Assumption of risk. — In PINTORELLI *v.* HORTONS ET AL. *(Rhode Island, February, 1901)*, 48 Atl. Rep. 142, demurrer to complaint in action for injury to employee while unloading a derrick from a wagon, was sustained, the *per curiam* opinion stating the facts as follows: "The only negligence alleged against the defendants is that their foreman, knowing of the peril and danger of the work in question, carelessly and negli-

to one of the uprights, tilted or fell over from its standing position, and, breaking the upright by the strain, fell on the deceased. We have looked through the evidence in vain for any negligence of the defendant. It is said that the deceased was inexperienced in such work, and received no instruction in regard to it. None was necessary. The work was plain for all men to see. There was no hidden or latent danger that required instruction to avoid. That the moving of heavy and unwieldy pieces of iron on their edges was an operation requiring care, to prevent any of them from falling over on the workmen, was plain to any man of the most ordinary intelligence. The deceased had worked as a laborer and a railroad hand, — work of the same. general kind as this, — and the fact that the girders were larger and heavier than usual did not change the nature of the work. It is further said that the skids were defective in their construction. But for that the defendant is not responsible. The materials were selected and the skids built by the shipping gang, of

gently assured the plaintiff that there was no danger to him in unloading the derrick from the wagon. This is not sufficient to put the defendants to a trial, in view of the other facts set out in the declaration. These are, in brief, that it was a rainy day, and that the poles of the derrick which was to be unloaded were wet and slippery. The fact that they were in this condition, and hence liable to slip while being unloaded, was as obvious to the plaintiff as to the defendants' foreman, and hence no duty was devolved upon the defendants of warning the plaintiff against the danger therefrom. Knowing of the danger, he must be held to have assumed the risk. Moreover, the assurance of the foreman that there was no danger was not within the scope of his authority to give, and hence, although acted upon by the plaintiff, was nothing for which the master was responsible. It was a mere error of judgment on a subject on which the plaintiff had the same means of knowledge as the foreman. The contention of plaintiff's counsel that the defendants are liable because the assurance referred to was given by the plaintiff's superior is untenable, for the reason that in giving it he was not discharging any duty devolved by law upon his principal; and hence his negligence, if such it can properly be called, was the negligence of a fellow-servant. Brodeur *v.* Falls Co., 16 R. I. 448, 17 Atl. Rep. 54; Hanna *v.* Granger, 18 R. I. 507, 28 Atl. Rep. 659; Larich *v.* Moies, 18 R. I. 513, 28 Atl. Rep. 661; Frawley *v.* Sheldon, 20 R. I. 258, 3 Am. Neg. Rep. 734, 38 Atl. Rep. 370; Morgridge *v.* Telephone Co., 20 R. I. 386, 39 Atl. Rep. 328. The declaration does not bring the case within that class of cases where the master is held liable for injuries sustained by the servant while acting in an emergency under the orders of a superior, whom he was instructed to obey, and while doing something out of his ordinary line of employment, as was the case in Mann *v.* Print Works, 11 R. I. 152. In that case evidence was offered tending to show that when the plaintiff was employed he was given to understand that he was to obey the orders of his superior, the engineer, which clearly differentiates the case from the one before us. The demurrer is sustained."

which the deceased was a member, under very general orders from the superintendent, which did not limit the materials or the mode of construction.

Evidence was offered on the part of plaintiff, and admitted, that moving such heavy girders by hand was not the usual way in the business, and that they should be moved by a crane or other machinery. The evidence fell far short of showing that moving by hand was not usual, but, even, if it had come fully up to the offer, it was introduced and submitted to the jury from an incorrect point of view. It was held in Titus *v.* Railroad Co., 136 Pa. St. 618, 20 Atl. Rep. 517, that an employer performs his duty when he furnishes appliances "of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences not of danger but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business." This, it must be observed, is the test to disprove negligence, not to prove it. The party charged with negligence disproves it by showing that the tools he employed were those in general use in the business, but the converse does not follow. The party charging negligence does not show it by showing that the machinery was not in common use. If it should be so held, the use of the newest and best machine, if not yet generally adopted, could be adduced as evidence of negligence. Our attention has been drawn recently to a tendency to this misapplication of the principle on the part of counsel, and even the courts. In the present case the learned judge below, in a very clear and excellent charge, stated the true rule in behalf of defendant, — that it "cannot be held responsible if something happens to an employee in its employment, where the manner and machinery and methods and appliances are alleged to have been defective, when it is shown they are the ordinary methods, machinery, and appliances used in that kind of work and business." But he unguardedly followed this by summing up thus: "We leave it to you to say, under all the evidence in the case, * * * whether the method of handling the structural iron by hand — shifting it by hand in the way it was shifted — was the ordinary method used, under all the circumstances of the case, and whether all the machinery and methods and appliances connected with the moving of these iron beams were such as were ordinarily used in the business generally for such

work." This might easily be construed by the jury as authorizing them to find negligence from the bare fact that the method was not in general use. There should always be a caution against such a construction, and the evidence should not, in the first instance, be admitted on behalf of the plaintiff, unless it tends to show that the method pursued was not only unusual, but more dangerous in itself than the ordinary one. As already said, the circumstances of the accident are practically undisputed. From them it is clear that the immediate cause was the failure to keep the girders that were not yet moved securely tied to both the uprights, or the failure to make the uprights sufficiently strong. But even on plaintiff's view, that defective construction of the skids themselves contributed to it, we fail to find evidence of any negligence in the case that was not that of co-employees. The jury, therefore, should have been directed to find a verdict for the defendant.

Judgment reversed.

HENRY v. CITY OF WILLIAMSPORT.

Supreme Court, Pennsylvania, January, 1901.

PEDESTRIAN INJURED ON SIDEWALK — NEGLIGENCE FOR JURY. — Where plaintiff fell on the sidewalk and was injured, and it appeared that at the point where she fell there was an abrupt descent of seven and one-quarter inches, with a slope of nineteen inches to the sidewalk, the question of whether the city was negligent in the performance of its duty was properly for the jury (1).

APPEAL from Court of Common Pleas, Lycoming County.

Action by Margaret Henry against the City of Williamsport for injury from a fall on a sidewalk. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

1. For other actions arising out of Injuries Sustained on Defective Sidewalks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

Child falling off sled on sidewalk— Slope of street— Town not liable. — In TOMPSETT ET AL. *v.* GLADE TOWNSHIP *(Pennsylvania, February, 1901)*, 48 Atl. Rep. 255, an action for injury to plaintiff's son who was injured on sidewalk, direction of verdict for defendant was proper, the facts being stated in the charge of the court below as follows: "In February, 1898, the plaintiff Harry Tompsett resided in Glade Township, in a house that belonged to Dr. Hepburn, on the public road or highway between the borough of Warren and what is known as 'Glade Run.' Some time prior to that time a sidewalk was built in front of this property by the

JOHN J. REARDON, for appellant.

CHARLES K. GEDDES and WM. W. HART, for appellee.

MCCOLLUM, J. — The important question presented on this appeal is whether the learned judge of the court below erred in refusing to instruct the jury to render a verdict for the defendant. It seems plain enough to us, however, that it was for the jury to determine from the evidence whether the injury the plaintiff received by her fall on the sidewalk was caused by a failure of the defendant to exercise a proper supervision over it. If the jury had found from the evidence that the plaintiff's injury was caused by her own negligence, or that the defendant was not in default in the performance

then owner of the property, and in front of other property along the highway. It was built in pursuance of a petition by citizens residing along said highway, and a notice by the road commissioners of Glade township to the citizens who were residing along that highway to build the sidewalk, and built under an act of assembly relating to Glade township, passed April 9, 1873. On the 23d day of February, 1898, the little son of Harry Tompsett, aged, I believe, then about three years and three months, was being drawn along the sidewalk in front of that property by Belle Davidson, a young girl, aged at that time about eight years, as I remember the testimony. The sidewalk and land there sloped towards the east, or towards Glade Run, to some extent, and the little girl, Belle Davidson, was drawing the boy in the direction of Glade Run. The only person who saw the injury complained of in this case, to the boy Harold Tompsett, was Belle Davidson. She states that at a certain point on that sidewalk the boy fell off the sled, and fell down to the street grade, and onto or near the street-car track. The evidence shows that the street had been cut down in front of that property, after the sidewalk was built, to the extent of from two to three feet, averaging, as near as I remember the evidence, some two and one-half feet, and that the boy fell to the ground. The evidence shows that the street-car track was close to the bank, or not very far from the edge of the sidewalk. Belle Davidson states that there was a slope in the sidewalk towards the street at the point where the boy fell. She also speaks of a break in the sidewalk. Now, this action is based upon negligence. Unless there is some negligence shown on the part of the township officers in the construction or keeping in repair of that sidewalk, there can be no recovery on the part of the plaintiff; and it is necessary for the plaintiff to show that the injury was caused by that negligence, or by the negligence which is complained of on the part of the plaintiff. It must be the direct cause of something done on the part of the township officers, or some neglect of duty which amounts to negligence. Now, as to what caused the injury, or what caused the boy to fall, it is all in the testimony of Belle Davidson. Nobody else saw the two children, and there is nobody to tell how it occurred except this girl, Belle Davidson, and she states that the boy fell from the sled, and fell down to the street-car track. She also states that the sled was also down on the street-car track or street. We feel bound, gentlemen of the jury, to say to you that, under all of the evidence and the pleadings in the case, there can be no recovery." Judgment affirmed.

of its duty in the premises, the result in either case would have been fatal to the plaintiff's suit. It was undoubtedly the duty of the jury to carefully consider all the evidence in the case, and to ascertain from it who was properly chargeable with negligence. If the jury found that the plaintiff was not guilty of negligence, their finding would have warranted a recovery by her, provided the defendant was found to be negligent in the performance of the duty cast upon it. At the point in the sidewalk where the plaintiff fell there was an abrupt descent of seven and one-quarter inches, with a slope of nineteen inches to the sidewalk below. It cannot well be said that a slope thus formed was a safe place for pedestrians to pass over at night. In the daytime, and with snow and ice upon the sidewalk, a slope like this would not be regarded as a desirable structure. On the evening of December 12, 1896, the plaintiff, with Miss Ashton, called upon Mrs. Sampson, and remained with her until a short time after ten o'clock, when they started to return to their boarding house. On reaching the slope, the plaintiff, in passing down it, slipped and fell, and on attempting to rise she slipped and fell again. In her next effort to get upon her feet she was assisted by Miss Ashton, who succeeded in getting her to their boarding house. It is not necessary to describe herein the nature and extent of her injuries, or to specify the expenses incurred in the effort to overcome the pain she suffered as the consequences of them. These matters are fully stated in the testimony, and are not gainsaid by the defendant. The charge of the court was considerate and careful, and we do not detect any errors in it. As before said, it was the province of the jury to pass upon the questions of negligence raised by the testimony, and this they have done. Their conclusions were warranted by the evidence, and there is no fair ground for complaint by either party. The specifications of error are, therefore, dismissed.

Judgment affirmed.

CITIZENS' RAILWAY COMPANY v. FORD.

Court of Civil Appeals, Texas, February, 1901.

PEDESTRIAN STRUCK BY STREET CAR WHILE CROSSING TRACK — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. — In an action to recover damages for injuries to plaintiff's wife, it was alleged that she attempted to cross a street when she saw a car on one of defendant's tracks, and that she passed around in front of a car which had stopped to adjust a

switch, and while she was walking on across the street with due care, another car of defendant, on a parallel track, ran against and struck her. The court charged the jury that upon certain conditions the plaintiff could recover, unless his wife was guilty of contributory negligence, not grouping the facts relied on to show contributory negligence; and then more definitely instructed that if she failed to look and listen for the approaching car, as a person of ordinary care would have looked and listened, and would have discovered in time to have avoided the injury, she would be guilty of contributory negligence. The defendant requested a special instruction that if plaintiff's wife ran in front of the car while it was in motion, and in about six feet of same, and then without stopping or looking or listening, ran into another car of defendant's in daylight, when both cars were in plain view, and she could, by the use of ordinary diligence, have known that both cars were passing along the street, the jury should find for defendant. *Held*, that the requested charge grouped the facts relied on to establish contributory negligence, and that the testimony would warrant the facts so assembled, and it was error to refuse to charge as requested by defendant (1).

APPEAL from District Court, McLennan County.

Action by Isham Ford against the Citizens' Railway Company. From a judgment in favor of plaintiff, defendant appeals. *Judgment reversed.*

1. For other actions relating to Injuries to Pedestrians Crossing Street-Car Tracks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

Boy struck by flat car while crossing track. — In GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY CO. *v.* KIEFF *(Supreme Court, Texas, January, 1901)*, 60 S. W. Rep. 543, an action brought by James Kieff, as next friend of Edmund Kieff, against the Galveston, Harrisburg & San Antonio Railway Company, to recover damages for personal injuries, the plaintiff recovered a judgment, which was affirmed upon appeal. "The following facts, except as to the immediate manner of the accident, appear by the uncontroverted testimony in the case: On the day of the accident the foot of the plaintiff, a lad then thirteen years of age, was run over, and his big toe crushed, by a car of the defendant. The car which caused the accident was a flat car, which was loaded with material for the construction of a fence around defendant's yard, and had been put in position by an engine and left upon the track for convenience in constructing the fence. The work was intrusted to a gang of laborers, five in number, according to the evidence of the defendant, and not more than six or seven as testified to by the plaintiff and his witnesses. The manner of doing the work was for the workmen to push the car along the track to the point or points where it was to be unloaded. The parents of the plaintiff resided at a place about 240 feet south of the track. Just before the accident, the plaintiff was on the north side of the track, six or seven feet from the car. He started across the track to go to his home, and just before or about the time he did so the car was set in motion by being pushed along by the men who were engaged in constructing the fence. According to the testimony, the speed at which it could have been pushed did not exceed one mile per

"This suit was brought by appellee, Isham Ford, against the appellant, the Citizens' Railway Company, of Waco, Tex., for damages for personal injuries to his wife, Mattie Ford, occasioned by a car of defendant striking her while she was returning to her work at the Pacific Hotel, where she was employed as a pastry cook. She alleged that just as she attempted to cross Fourth street going east she saw a car on one of the company's tracks, and that she passed around in front of a car on the track, which had stopped to adjust

hour. It was assigned as error in the Court of Civil Appeals that the trial court should have granted a new trial on the ground that there was no evidence of negligence, and the same assignment is insisted upon in this court. The mere fact that the car was left standing in a street, (assuming it to be a street) was not an act of negligence as to this plaintiff. If there was negligence at all as to him, it was in the manner and circumstances of propelling the car. The moving of a car over the track of a railroad company along or across a public street is in itself a lawful act, but may become negligent from the attending circumstances and the manner of its movement. The negligence which results in an actionable wrong is the failure to discharge a duty owed to the party injured. It is a duty incumbent upon all men to use ordinary care so to act as not to injure others. The duty arises when there is reason to anticipate danger. The rapid propulsion of cars drawn by steam or other locomotory engines over a railroad track is calculated to endanger the lives of persons on or very near the track, so that in crossing the streets of a city, or a public road, or other much frequented way ordinary prudence dictates that those operating the train or cars should take precautionary measures to guard against such danger. In such cases the question of negligence is one of fact which is to be determined by a jury. But here we have a very different case. The movement of a car at a speed of a mile per hour is not dangerous to a person of any reasonable discretion, who is in possession of his senses and the use of his limbs. How, then, can it be said that the men operating the car in question should have anticipated danger from its movement? They saw the plaintiff near the car, and, while they must have known that he was a boy at the time, they had the right to conclude that he was of sufficient discretion to avoid injury where the danger was so slight. Since they had no reason to apprehend danger to the plaintiff, they were not negligent in moving the car." *Held*, that the trial court should have directed a verdict for defendant, and judgment for plaintiff reversed. Opinion by GAINES, Ch. J.

Child run over by street car — Railroad company liable. — In KOERSEN *v.* NEWCASTLE ELECTRIC ST. R'Y CO. *(Pennsylvania, January, 1901)*, 47 Atl. Rep. 850, an action by Eleanor Alice Koersen, a minor, by Edward Koersen, her father and next friend, against the Newcastle Electric Street-Railway Company, for injury to plaintiff, when three years and nine months old, from being run over by a car of the defendant, judgment for plaintiff was affirmed. The court (per FELL, J.), said: "The refusal of the court to direct a verdict for the defendant was clearly right. The plaintiff was not of an age to be charged with contributory negligence. The testimony on her behalf tended to establish these facts: The car was at a full stop at the end of its route. When the motorman was about to start it, the plaintiff left a chair on which she

a switch, and while she was walking on across the street with due care another car of defendant, on a parallel track, ran against her, causing the injuries for which she sues. It is alleged that the injuries were occasioned by the negligence of the defendant and its servants operating the car. It was alleged by a supplemental petition that she looked carefully to see if the crossing was clear, but could not see the approaching car that struck her on account of the car that had stopped, and no signals were given by the approaching

had been sitting on the sidewalk, and crossed the street to the curb on the other side, and then turned and walked back to the middle of the track, where she stopped and stood, apparently confused by cries of alarm from a number of persons who saw her danger. When the plaintiff started to cross the street the car was within 300 feet of her, and when she turned to recross it was not more than 120 feet from her, and she was less than twelve feet from the track. It was Sunday evening, and children were playing on the sidewalk. The street was but twenty-nine feet in width between the curbs. It was entirely free of vehicles, and there was nothing to obstruct the view. The motorman was not looking ahead, but to one side, towards a passenger who was riding on the front platform. The case presented by this testimony was not that of a child suddenly and unexpectedly running in front of a moving car, and giving rise to an immediate danger, against which there was no opportunity to guard. The circumstances were such as to require unusual care on the part of the motorman, and he had ample opportunity to observe the danger in time to guard against it. The jury might well infer that if he failed to look ahead he was negligent, or that if he looked he saw the child, and was negligent in not controlling the motion of the car so as to avoid injuring her. It is only in clear cases, where neither the facts nor the inferences to be drawn from them are in doubt, that the court is warranted in withdrawing the question of negligence from the jury. This is far from being such a case. The judgment is affirmed."

In an action by Edward Koersen against the Newcastle Electric Street-Railway Company for injury to his child, Eleanor, three years and nine months old, judgment for plaintiff was affirmed, FELL, J., stating the case as follows: "This appeal was argued with No. 78 [case reported in preceding paragraph], in which the opinion of the court, deciding that there was sufficient evidence of the motorman's negligence to take the case from the jury, has been filed. The testimony was the same in both cases, and we find nothing in it which would warrant the withdrawal of the case from the jury on the ground that the plaintiff was negligent in not selecting a proper caretaker for his child, or that the person in whose care she was placed was, under the circumstances, negligent. The judgment is affirmed." 47 Atl. Rep. 851.

Pedestrian struck and killed by street car — Contributory negligence. — IN SULLIVAN *v.* CONSOLIDATED TRACTION CO. *(Pennsylvania, January, 1901)*, 47 Atl. Rep. 944, an action by Kate Sullivan, in her own right and as mother and next friend of the minor children of Timothy Sullivan, deceased, against the Consolidated Traction Company, for death of said Timothy Sullivan, judgment of compulsory nonsuit was affirmed. The *per curiam* opinion is as follows: "The plaintiff's husband, while attempting to cross Penn avenue diagonally at the point east of Thirtieth

car, and that the motorman in charge of it could have seen her in time to have stopped, but negligently failed to do so. Defendant answered by general demurrer and denial, and that plaintiff's wife was guilty of contributory negligence in running in front of the first car, which, it is alleged, was in motion, and in passing close to it without waiting for it to pass, and also, in passing the first car, in running up against the second car, which was approaching, without looking or listening for the same, and so caused her own injuries by her negligence, when she could have seen the car and avoided the injury by the use of ordinary care. By supplemental answer defendant specially excepted to the amended supplemental petition

street towards Thirty-First street, stepped upon the west-bound track, and was instantly struck by a car of the defendant company from the east. The injuries received were the cause of his death within twenty-four hours of the occurrence. A clear case of contributory negligence was established by the evidence, which plainly showed that the deceased had full opportunity to see the approaching car and to avoid contact with it. The case is fairly within Watkins *v.* Union Traction Co., 194 Pa. St. 564. (7 Am. Neg. Rep. 317, n), 45 Atl. Rep. 321; Blaney *v.* Electric Traction Co., 184 Pa. St. 524, 39 Atl. Rep. 294, (4 Am. Neg. Rep. 207, n); Gilmartin *v.* Transit Co., 186 Pa. St. 190, 40 Atl. Rep. 322; and other cases of a like nature. We are clearly of the opinion that the court below committed no error in entering the nonsuit and refusing to set it aside. Judgment affirmed."

Pedestrian crossing track struck by street car — Contributory negligence. — In GRAY *v.* FORT PITT TRACTION CO. *(Pennsylvania, January, 1901)*, 47 Atl. Rep. 945, an action by Andrew Gray against the Ft. Pitt Traction Company for personal injuries, judgment of compulsory nonsuit was affirmed. From the evidence it appeared that plaintiff got off a west-bound street car at a street crossing; looked to the west; then turned around to pass the rear end of the car, when he saw another west-bound car approaching on the same track; waited till it stopped; then passed behind the car he had gotten off; when two-thirds the way across the track on which it was, looked towards the car following, and hurried forward on hearing a warning note from such car, and was struck by an east-bound car on the next track. The *per curiam* opinion was as follows: "The only question for our consideration on this appeal was whether the court below erred in holding that there was contributory negligence on the part of the plaintiff which prevented a recovery of damages for an injury he received while attempting to cross in front of the defendant's car. An examination of the evidence in the case plainly shows that the plaintiff's contributory negligence fully justified the court in entering the nonsuit and refusing to take it off. If authorities are needed to support the conclusion arrived at by the court below, it is sufficient to refer to the following cases, to wit: Buzby *v.* Traction Co., 126 Pa. St. 559, 6 Am. Neg. Cas. 311, 17 Atl. Rep. 895; Blaney *v.* Electric Traction Co., 184 Pa. St. 524, (4 Am. Neg. Rep. 207, n), 39 Atl. Rep. 294; Nugent *v.* Traction Co., 181 Pa. St. 160, 37 Atl. Rep. 203; and Watkins *v.* Union Traction Co., 194 Pa. St. 564, (7 Am. Neg. Rep. 317, n), 45 Atl. Rep. 321. Judgment affirmed."

because it was an enlargement of plaintiff's original cause of action, and not a supplemental petition, as it was styled; and further denied all the allegations of the amended supplemental petition. The court overruled all the demurrers and exceptions, defendant excepting. The trial resulted in a verdict for plaintiff for $1,000, for which judgment was rendered, and, a new trial being refused, defendant has appealed.

"The facts, briefly stated, are: Plaintiff's wife, Mattie Ford, was employed as pastry cook at the Pacific Hotel. Went home to look after her children at noon, and was returning to the hotel about one o'clock P. M., and had to cross the street-railway track. She was coming from the east, going west, on her way to the hotel. The tracks of the company — double tracks — ran at this point north and south. When she came near the track on the west, a car had stopped in the way, or, if moving, was moving slowly to make a switch, headed southward on the west track. She passed rapidly in front of this car, a few feet out of the usual path to the south of it. Another car, moving in the same direction, came up on the east track, also moving southward. When she came to the first car she could not see the second car beyond it. The second car made no halt. There were only a few feet between the two tracks, and about one foot and a half between the cars in passing. She did not see the second car, watching the first car while passing in front of it; and after she passed it, and before she knew it, the second car struck her, causing the injuries alleged. Whether it ran upon her, the front end striking her, or whether she ran upon it, colliding with the side steps, is not certain, as upon this the testimony is conflicting. There was nothing between the cars to obstruct the view from one to the other, and if she had been looking in front of her she could have seen the second car in passing the first, and certainly after she had passed it. The testimony would support a finding that no signals were given by the second car on approaching the crossing, though there is testimony of the driver that he sounded the gong on arriving near the crossing."

CLARK & BOLINGER, for appellant.

EUGENE EASTERLING and J. W. TAYLOR, for appellee.

COLLARD, J. (after stating the facts). — The court charged the jury that upon certain conditions the plaintiff could recover, unless his wife was guilty of contributory negligence, not grouping the facts relied on to show contributory negligence; and then more definitely instructed that if she failed to look and listen for the approaching car, and that a person of ordinary care would have looked and listened, and would have discovered it in time to have

avoided the injury, and that such conduct was negligence as defined, and that such negligence contributed to her injuries, she would be guilty of contributory negligence; in which event, if the jury should so find, to return a verdict for the defendant. On the same subject of contributory negligence defendant asked the following special charge: "If you believe from the testimony that Mattie Ford ran in front of defendant's street car known as 'Belt Car' while it was in motion, and in about six feet of same, and that after this, and without stopping or looking or listening, ran into defendant's car known as 'Washington Street Car' in daylight, when both of said cars were in plain view; and if you believe that Mattie Ford could have known by the use of ordinary diligence that both of said cars were passing along said street; and if you further believe that such conduct of Mattie Ford was negligent, and such acts as would not have been performed by a reasonably prudent person under the same circumstances, — then, if you so believe, you will find for defendant, and so say by your verdict." It will be seen that the requested charge grouped the facts relied on and pleaded to establish contributory negligence, and that the testimony would warrant the finding of the facts so assembled. The court's charge was not so comprehensive upon the question, and the amendment proposed by the requested charge would more clearly and pertinently have placed the issue before the jury, thus aiding and supplementing the incompleteness of the charge given by the court; and we believe the requested charge ought to have been given, and that it was error to refuse it. It is true, the requested charge did not state that, to defeat a recovery, the negligence of Mattie Ford must have contributed to the injury, but the court's charge did so, and the charge asked must be read in connection with the proper explanations of the court's instructions upon that subject. So read, it is entirely sufficient. We believe, however, that there could be no doubt that the conduct of the plaintiff's wife contributed to the injury, if it should be held that she was guilty of negligence, as stated in the requested charge; and we hold that in such case it was not necessary to require a finding as to the effect of such negligence. But one conclusion could follow as a result of her negligence if it existed as propounded in the charge asked. The omission, therefore, to demand a finding as to such result, is not important. Because of the error in refusing to give the requested charge the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY v. McCARTY.

Supreme Court, Texas, January, 1901.

PASSENGER INJURED IN RAILROAD WRECK — RELEASE — INJURIES — MUTUAL MISTAKE. — In an action to recover damages for injuries sustained by plaintiff, a passenger, received in a railroad wreck on defendant's road, it appeared that plaintiff signed a release, shortly after the accident, in full settlement of damages for the injury. *Held*, that the release could not be set aside on the ground that the parties thereto were mistaken as to the injury the plaintiff had sustained, and there could be no recovery for additional injuries not included in such settlement, as the release embraced all damages resulting from plaintiff's injuries (1).

CERTIFIED question from Court of Civil Appeals of First Supreme Judicial District.

Action by Charles McCarty against the Houston and Texas Central Railroad Company. From a judgment in favor of defendant, plaintiff appealed to the Court of Civil Appeals, which certified a question of law to the Supreme Court.

BAKER, BOTTS, BAKER & LOVETT and FRANK ANDREWS, for appellant.

JACOB C. BALDWIN and J. V. MEEK (R. E. HANNAY, of counsel), for appellee.

GAINES, Ch. J. — This case comes to us upon a certified question. The certificate is as follows:

"Appellee, while a passenger upon one of appellant's passenger trains, was injured in a wreck caused by the actionable negligence of appellant. He was promptly taken to appellant's infirmary at Houston, that his injuries might be dressed and cared for. While there appellant's claim agent began to negotiate with him for the settlement of his claim against the company. At that time appellee appeared to have sustained no other injury except a dislocation of his ankle, and it was shown by the evidence that no other injuries were considered by the parties to the settlement, and no other injuries entered into and in fact formed any part of the consideration for the settlement, except the loss of the watch, which was included in the settlement at a valuation of $30. Neither the appellant's agents nor appellee knew or suspected injury to any other

1. On the question of the validity of a release, see Dixon *v.* Brooklyn City & Newtown R. R. Co. (City Court of Brooklyn, New York, January, 1883, not officially published), 5 Am. Neg. Cas. 249–254.

part of appellee's person, and appellee exercised reasonable care to ascertain if he was otherwise injured. The sum accepted in settlement was grossly inadequate and out of proportion to the injuries to other portions of his body, which, though at that time unknown, were shortly thereafter discovered to exist, and appellee could not have been induced to settle for the sum named in the release had he been aware of his real condition. When the amount was agreed upon, appellee executed a release in writing, which was prepared by the company's agent for his signature. Said release is in the following language: 'Know all men by these presents, that I, Charles McCarty, of the town of Welborn, Texas, for and in consideration of the sum of four hundred and thirty dollars to me in hand paid by the Houston and Texas Central Railroad Company, of the State of Texas, have remised, released, and forever discharged, and by these presents do, for myself, my heirs, executors, administrators, and assigns, remise, release, and forever discharge, the Houston and Texas Central Railroad Company of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever which I had or have now, or which I or my heirs, executors, administrators, or assigns can, shall, or may have, by reason of any damage or personal injury sustained by me in the wreck of the south-bound passenger train, No. 4, of said Houston and Texas Central Railroad at Fairbanks yesterday morning at five o'clock, on which train I was a passenger, and on my way from Welborn to Houston, or by reason of any matter, cause, or thing whatsoever. In testimony whereof, I have hereunto set my hand and seal on this, the twenty-eighth day of April, 1897. [Signed] Chas. McCarty. [L. S.] Witness: J. R. Stuart, E. L. Adams.' Shortly after the execution of this release, appellee discovered that he had sustained injuries to his spine and bowels, which were of a much graver and more permanent nature than the injuries settled for, and which would practically destroy his usefulness for the remainder of his life. Whereupon he brought this suit to set aside the release and recover for the additional injuries. The grounds upon which he sought to set it aside were that both he and appellant's agents were mistaken in supposing he had sustained no other injuries than a dislocated ankle; that no other injury save that to the ankle was considered or entered in any way into the settlement; that he could not have been induced to settle, had he known of these other and graver injuries; and that, believing and having reason to believe that he had no other claim against the company, he was induced to receipt them in full in the general terms used in the release. The question of primary

liability on the part of appellant, and the issue of mistake as affecting the validity of the release, in so far as it purported to be a bar to recovery for the unconsidered injuries, were submitted to a jury, and the trial resulted in a verdict for appellee; the recovery being confined by the charge of the court to only such damages as appellee had sustained by reason of the unconsidered injuries; no damages being allowed for the injury to the ankle, which the court held had been settled for in full, as evidenced by the release.

"The question presented, and which we respectfully certify, is as follows: Can the release in question be set aside, except in so far as it evidences a discharge for injuries to the ankle, on parol proof that the parties thereto were mistaken in supposing that the injury to the ankle was the only injury which appellee had sustained; it also being made to appear by parol that, notwithstanding the language of the writing, no other injury was in the minds of the parties, and that if the other injuries had been known the release would not have been executed."

In Gilliam *v.* Alford, 69 Tex. 267, 6 S. W. Rep. 757, the court, speaking through the late Chief Justice Stayton, and quoting from Pomeroy's Equity, announced the rule in regard to voluntary settlements as follows: "The rule in such cases is that 'voluntary settlements are so favored, that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge concerning the circumstances involving those rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they have voluntarily entered must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed, had the controversy been brought before it for decision.'" We are unable to see any circumstance in this case to take the release out of the general rule. The appellee, who was the plaintiff in the court below, had at least the same knowledge and the same means of obtaining knowledge as the appellant, and if there was no fraud in the transaction the settlement was binding upon him. That where a party who has a claim against another for personal injuries agrees upon a settlement of his claim, and accepts a sum of money or other thing of value in settlement of such claim, he is, in the absence of fraud or concealment, concluded by the settlement, is a proposition sustained, as we think, by the great weight, if not by an unbroken line, of authority. We cite some of the cases: Rideal *v.* Railway Co., 1 Fost. & F. 706; Kowalke *v* Light Co., 103 Wis. 472, 79 N.

W. Rep. 762; Seeley *v.* Traction Co., 179 Pa. St. 334, 1 Am. Neg. Rep. 179, 36 Atl. Rep. 229; Railway Co. *v.* Turnbull (Miss.) 16 So. Rep. 346; Homuth *v.* Railway Co., 129 Mo. 643, 31 S. W. Rep. 903. The case first cited (Rideal *v.* Railway Co.) was very like the case before us, in the respect that the injuries, at the time of the release, appeared trivial, but that there was testimony tending to show that afterwards they proved to be serious and permanent. In the charge to the jury the court say: "No doubt, a man might well be ready to take a certain sum in satisfaction of such injuries as he was sensible of, which would not be any equivalent for serious and permanent injuries. Still if, in fact, a man has done so, he is bound by his bargain." In the Wisconsin case (Kowalke *v.* Light Co.) the court dispose of the question of a mistake of fact, and thus announce the limitations upon the rule which justifies an interference by the courts upon that ground: "The most philosophical definition we have found is that presented by Pomeroy (Eq. Jur., sec. 839): 'An unconscious ignorance or forgetfulness of the existence or non-existence of a fact, past or present, material to the contract.' This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge, whether a fact which may or may not exist does so. Kerr, Fraud & M. 432. This idea is involved in, and furnishes a reason for, the exception pointed out by Dixon, C. J., in Hurd *v.* Hall, 12 Wis. 112, 127, on authority of Kelly *v.* Solari, 9 Mees. & W. 54, viz., where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense. These limitations are predicated upon common experience, that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance."

The cases relied upon by counsel for appellee do not, in our opinion, sustain their contention. We will notice some of them. In Lyall *v.* Edwards, 6 Hurl. & N. 337, the defendants to an action of trover pleaded a release; and the plaintiff replied, in substance, that, the defendants being insolvent, they, in connection with the other creditors, and in consideration of an assignment of the property of the defendants for the benefit of all their creditors, executed the release, but that at the time of its execution, without default on their part, they were ignorant that their goods had been converted. Upon demurrer it was held that the replication was good. There

the claim in dispute was a distinct cause of action, of which the plaintiffs had no knowledge, and of the existence of which they had no reason to suspect at the time the discharge was executed. It seems to us, the release was properly construed not to embrace such claim. The gist of the ruling in Ramsden *v.* Hylton, 2 Ves. Sr. 304, appears in the following headnote: "General release from a sister to a brother not binding as to particular rights under the marriage settlement or articles of the parents; the sister being ignorant of them, and the brother having covenanted that he was seised in fee, contrary to the fact." In passing upon the release, Lord Hardwicke says: "The strongest and most material objection is the release; but I am of opinion it would not be construed as a release of this demand, either in point of law or in a court of equity. First, it is certain, that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties and intended to be released." There, too, the matter in dispute was the release of a separate demand. The case of Lumley *v.* Railway Co., 22 C. C. A. 60, 76 Fed. Rep. 66, is more like the case before us. But in that case the release specified certain injuries, but concluded with a general release of all demands growing out of the accident. In their opinion the court say: "We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given, specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties, of a character so serious as to clearly indicate that if it had been known the release would not have been signed. This jurisdiction is well known, and has frequently been applied in cases of release affecting property rights, both in courts of law and equity." This, it seems to us, is a mere application of the rule announced by Lord Hardwicke in the case of Ramsden *v.* Hylton, above cited. The same rule was applied in the case of Railway Co. *v.* Artist, 9 C. C. A. 14, 60 Fed. Rep. 365. The other cases cited by appellee are less applicable to the facts before us, and require, as we think, no especial comment. The case before us is, in our opinion, clearly distinguishable from Lyall *v.* Edwards, cited above. There the unknown matter was a separate cause of

action, which could not have been concluded by a judgment upon the claims which were in contemplation of the parties at the time the release was executed. Here there is but one cause of action, and, if the plaintiff had sued and recovered for the injuries of which he had knowledge at the time of the release, he would have been precluded from an additional recovery. This case is also clearly to be distinguished from the Lumley Case and the other cases on that line. In those cases the contract was neither set aside nor impaired by reason of any mistake of the parties to the release. There, by a rule of construction, the operation of the release is restricted to the particulars mentioned. Here no particular injuries are mentioned. The release is of all damages which have accrued or which may accrue to the plaintiff by reason of the accident in which he was injured. Here, then, the terms of the release are not to be mistaken, and the contract is not open to construction. In the face of such an instrument, it cannot be said that all the injuries which might be developed as a result of the accident, whether known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms. In all such cases the damages are ascertainable in a legal sense, but in fact are uncertain in amount. Until the extent of the injuries has been clearly developed, they may be more or less than appearances would indicate, and, therefore, in every settlement of the character of that under consideration the parties take the chances of future development, — the one of paying more than an adequate compensation for the wrong inflicted, and the other of receiving less.

Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it cannot be varied by parol evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties. We, therefore, answer the question in the negative.

TESCH v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

Supreme Court, Wisconsin, January, 1901.

COMPARATIVE NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — CROSSING TRACK — "STOP, LOOK, AND LISTEN" — INSTRUCTIONS — STREET-CAR TRACK — RIGHT OF WAY — DRIVING

ACROSS STREET-CAR TRACK — COLLISION. — 1. The doctrine of comparative negligence does not prevail in this State. Therefore, in a case involving the subject of contributory negligence, the rule that obtains in some jurisdictions does not apply, that if plaintiff was guilty of contributory negligence he may yet recover if defendant discovered his peril in time to have avoided injuring him by the exercise of ordinary care; nor the rule that, notwithstanding plaintiff's negligence, he may recover if defendant was guilty of gross negligence, speaking of fault not amounting to actual intent to injure, or that wanton disregard for the safety of others equivalent thereto sometimes called constructive intent; nor the rule that if plaintiff's negligence preceded that of the defendant in time, and the latter by the exercise of ordinary care could have avoided injuring the former and failed to do so, the negligence of the former is considered a condition, and the negligence of the latter the sole proximate cause of the injury, notwithstanding such condition was a mere continuance of the negligent act and concurred with defendant's fault at the instant of the accident and produced it (1).

2. The doctrine in this State is that contributory negligence of the plaintiff, however slight, precludes his recovering of the defendant on the ground of negligence, regardless of the degree thereof, speaking of conduct characterized by inadvertence, not that misconduct known in the decisions of this court as gross negligence.

3. Before crossing a railway track, regardless of whether it be a steam or electric street railroad, a person should look both ways and listen for a coming car and perform that duty when and where it will be reasonably certain to effect its purpose; and diversion of attention, generally speaking, will not exuse the performance of such duty; neither will misconduct on the part of the railway company (2).

4. If in taking a special verdict questions be submitted covering singly all the material controverted facts in issue, a refusal to submit other questions covering the same subjects in a different form, or covering evidentiary facts, is proper.

5. A refusal to instruct a jury in accordance with suggestions contained in special questions presented for submission to them, or the giving of instructions in regard to a particular subject, is not reversible error, if, by the verdict rendered, it is clear that the facts necessary to the applicability of such instructions given or refused did not exist.

6. An ordinary traveler upon a public street where a street-car line is located and operated under a public franchise having no restrictions or regulations as to the manner of operating cars, has not the same right to go upon the track and compel the stopping of a car to enable him to pass over the track as the operator of the car has to delay his passage to enable the car to pass.

7. The ordinary traveler has the right of way in crossing a street-car track in advance of an approaching car, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has

1. See note on the Doctrine of Comparative Negligence, appended to the Illinois case of Pioneer Fireproof Construction Co. *v.* Sunderland, reported in this volume, pages 259–252, *ante*.

2. See also Brown *v.* Chicago & N. W. R'y Co. (Wis.), case next reported herein, and Note on the Rule of Stop, Look and Listen, appended thereto.

sufficient time, proceeding reasonably, to clear the track without retarding the movement of the car if its rate of speed is lawful; and if it turns out that he has miscalculated, he is not chargeable with want of ordinary care or with violating any rights of the railroad company if it is compelled to retard the motion of the car or even stop it to enable such person to cross the track; and in no event is such a person a wrongdoer so as to excuse the operator of the car from not exercising ordinary care to avoid injuring such person, though the fault of such person may preclude him from recovering damages for any injury that may result in part from his conduct.

8. If a person about to cross a street-car track in the circumstances above stated, observes a car that is coming towards him at an unreasonable rate of speed, or if in the exercise of ordinary care he ought to observe it, such care requires him to take that into consideration in determining the probability of his being able, proceeding reasonably under the circumstances, to clear the track and avoid being injured by a collision with the car.

9. If a person, traveling with a horse and carriage, approach a street crossing to pass over double street-car tracks located on the street running at right angles with that on which he is approaching, observes a car coming from the left on the track nearest him and one from the right on the other track, and stops for such cars to pass, the horse being located about ten feet from the nearest car rail, and the car from the left passes by and stops at the right-hand crosswalk and the one from the right passes over the street, — the conditions being such that he can see the furthest track at the right, looking by the front end of the stationary car, from a point about 100 feet from the crossing to a point about 100 feet further to the right and can see such track in front of him to the left of the stationary car for about forty feet from the point of crossing, leaving about sixty feet of the furthest track to the right out of view because of the stationary car, — and a second car is approaching from the right on the furthest track, a little way behind the first car coming from that direction, and at the instant the second car passes by he looks both ways for other approaching cars and sees one coming from the left, though not dangerously near, and none coming from the right, though at the instant of taking the observation one has just passed out of view within the sixty feet of track shut out from observation by the stationary car and is approaching at a speed of ten miles an hour, an unusual rate of speed for that situation and under the circumstances, without giving any signal of its approach, and he then starts to cross the track believing the way to be safe, he is not guilty of a want of ordinary care as a matter of law. The rule requiring one to take an observation of a railroad track before attempting to cross it, reasonably calculated to acquaint him of the presence of cars in dangerous proximity to the crossing, is not in conflict herewith.

(Syllabus by the Judge.)

APPEAL from Superior Court, Milwaukee County.

Action by Charles F. Tesch against the Milwaukee Electric Railway and Light Company. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

"Action to recover damages for a personal injury. The evidence produced bearing on the issues made by the pleadings established

or tended to establish the following: Virginia street runs east and west and Reed street crosses it at right angles running north and south, in the city of Milwaukee. Such streets are about sixty feet wide between curb lines. The defendant has a double-track electric street railroad on Reed street, operated by the overhead trolley system. The streets are much used, particularly at the crossing. Street cars pass both ways at short intervals, those going south using the west track and those going north the east track. Plaintiff was perfectly familiar with the crossing and all the dangers attending its use by travelers with teams. Both streets were sufficiently level to permit a view of them either way by one standing at the crossing. There were buildings on the corners on the west side, so that one approaching the railway tracks on Virginia street from that side could not see the tracks up and down the street till he arrived at the crossing. On November 26, 1897, commencing about eight o'clock A. M., there was a snowstorm which lasted till after the happening of the injury, which was a little later in the day. The falling snow prevented a clear view of objects up or down the street, but the difficulty was not so great but that an approaching street car could readily be seen for a distance of more than 150 feet. The falling snow and other weather conditions caused the street-car track to be slippery, so that it was impracticable for a motorman to control his car as completely as he otherwise could. On account of such conditions the motorman on the car that produced the injury was unable to determine readily within what distance he could stop it, because the wheels were liable to slip on the track. In the circumstances stated, plaintiff and his brother, riding in a covered buggy, with no curtains thereon, drawn by a gentle horse, approached the crossing from the west, driving on Virginia street. As they arrived at a point where they had a full view of the street-car tracks both ways on Reed street, they observed two cars approaching, one from the north on the west track and one from the south on the east track. The cars were so near the crossing that plaintiff did not think it was safe to attempt to cross. He stopped his horse so that its feet were located about twelve feet from the west rail and the buggy seat was located about at the curb line, distant about twenty-five feet from such rail. While plaintiff was so located the car coming from the north passed and stopped to allow a passenger to alight at the south crosswalk. Immediately thereafter the car going north on the east track passed over the crossing without stopping. Plaintiff then looked both ways for coming cars and observed one coming from the north about 150 feet from the crossing, but did not see any coming from the south,

though one had just disappeared from view behind the car that was located at the south crosswalk. The car approaching from the north was moving pretty fast and the motorman, observing plaintiff's purpose to cross, sounded his gong vigorously. Plaintiff, thinking he had time to make the crossing, started and moved pretty fast in order to do so. He passed over the west track safely and as he did so he looked to the south and saw a car coming from that direction and so near that it was impossible for him to escape from the region of danger before the injury occurred. As the hind wheels of his buggy were about to pass over the east rail, he being located about over the rail, the car struck the buggy, partially demolished it, and threw him out forward and to one side a distance of some twenty-five feet, where he landed on the surface of the street and was injured. There was some conflict in the evidence as to whether the gong on the car was sounded; also as to the speed of the car and the distance it traveled after striking plaintiff's buggy. On the part of plaintiff the evidence was to the effect that it was going faster than usual and some ten miles an hour. On the part of defendant the evidence was very positive to the effect that it was going at a moderate and usual rate of speed and not over five to seven miles an hour. As to the sounding of the gong, the evidence on the part of plaintiff was that he did not hear it; that other witnesses in the vicinity did not, and that if it had been sounded plaintiff would have heard it. On the part of defendant the testimony of the motorman, passengers in the car and others, was to the effect that the gong was sounded vigorously and seasonably. As to the distance the car traveled after striking plaintiff's buggy, the evidence on his part was to the effect that it passed clear over the crossing and a considerable distance beyond, one witness placing it as far as half a block. On the part of defendant the evidence was to the effect that the current was reversed and the brakes set as soon as practicable after plaintiff was observed, and that the car stopped still before passing entirely over the north crosswalk. The evidence was further to the effect that the car that stopped at the south crosswalk stood there till about the instant plaintiff started to cross the tracks; that as he arrived at a point where he could have seen the north-bound car, had he been looking in that direction, and the motorman could have seen him, such car was very near the crossing. Plaintiff testified that the car he saw coming from the north 150 feet away was coming so fast that he hurried to get by; that he did not see the other car till it was nearly to him, and then it was too late. The jury rendered the following verdict, the substance of the findings being given, not the particular language of the verdict:

1. Plaintiff was injured at the time and place alleged, by one of defendant's street cars.

2. The car was going at an unreasonable and dangerous rate of speed when the injury occurred.

3. Such unusual and dangerous rate of speed was the proximate cause of the injury.

4. The motorman, in the exercise of ordinary care, ought to have seen plaintiff's peril in time to have avoided injuring him.

5. The failure to observe such peril in time to avoid the collision was not the proximate cause of the injury.

6. The motorman did not signal the approach of his car to the crossing by sounding the gong.

7. Said failure to sound the gong was not the proximate cause of the injury.

8 and 9 omitted as immaterial.

10. The motorman, after seeing plaintiff's peril, used all reasonable means to avoid the collision.

11 and 12 omitted as immaterial.

13. Plaintiff was not guilty of a want of ordinary care in that he did not see the car in time to avoid the injury.

14. Plaintiff was not guilty of any want of ordinary care which contributed to his injury.

15. Plaintiff suffered damages to the amount of $800.

At the close of the evidence a motion for a nonsuit was denied. On the coming in of the verdict there was a motion on the part of defendant to change the finding on the subject of contributory negligence of plaintiff, so as to find that he was guilty thereof; also to change the affirmative to negative answers to the questions relating to the speed of the car and its effect in producing the injury. The motions were made specific and proper upon the theory that the evidence conclusively established the facts as defendant desired them to appear in the findings. All of defendant's motions were denied and exceptions to the rulings in that regard and other rulings were duly preserved for review. Judgment was rendered in plaintiff's favor on the verdict."

SPOONER, ROSECRANTZ & SPOONER, for appellant.

EDGAR L. WOOD, for respondent.

MARSHALL, J. (after stating the facts). — This case involves a few plain familiar principles. Little or no help can be obtained by citing cases from other courts where the facts were materially different or the principles applied not recognized as law by this court. There are no precedents, as regards the facts, in the decided cases of this or other courts, that can be considered controlling or

materially helpful. Counsel for respondent has, with great industry and some misdirected professional energy, brought to our attention a mass of cases in support of the judgment; but so many of them are out of harmony with the settled rules of law recognized here, that an attempt to apply them to the facts of this case is confusing instead of helpful. There is little use in referring to adjudications to the effect that a diversion of attention will excuse a person, approaching a railway track with the intention of crossing the same, from performing the duty to look both ways and listen for coming cars, so as to carry the case to the jury on the question of whether the plaintiff, seeking to recover upon the ground of the defendant's negligence, was guilty of contributory negligence, because the rule here is, as it is in most courts, that such duty is governed by a rule of law and not to be determined as a fact, from evidence, by the jury. It is as useless to bring to the attention of this court cases where it has been held that, though the duty to look and listen exists, the testimony of the plaintiff that he performed that duty, yet did not see nor hear a coming car that was unquestionably within his sight and hearing, is sufficient to carry the case to the jury on the subject of his contributory negligence; because the rule here is that the duty to see those dangers that are in plain sight and hear those that are plainly within hearing by paying proper attention thereto, is just as absolute as is the duty to look and listen for them, and that a jury cannot be permitted to say that a person, called upon to perform that duty, did not see or hear such dangers, and base a verdict thereon. It is just as useless to urge upon the attention of this court adjudications to the effect that if plaintiff was guilty of contributory negligence he may yet recover if the defendant, after observing his peril, could have avoided inflicting the injury complained of, by the exercise of ordinary care, or cases to the effect that, notwithstanding plaintiff's contributory negligence, he may yet recover if the defendant was guilty of gross negligence, speaking of his conduct as characterized by negligence strictly so called, not intent, actual or constructive, to do the deed (see Bolin *v.* Railway Co. [Wis.; decided Dec. 7, 1900], 9 Am. Neg. Rep. 209, 84 N. W. Rep. 446); or adjudications to the effect that if plaintiff's negligence preceded defendant's a considerable period of time, by the act of going upon the track, and defendant by the exercise of ordinary care could have avoided the occurrence of the accident, the negligence of the plaintiff must be considered remote and his situation at the time of the injury a mere condition of it, and the negligence of the defendant the sole proximate cause thereof, notwithstanding plaintiff's negligence actually continued

to and met that of the defendant at the instant of the accident. Such rules are found, in whole or in part, where the doctrine of comparative negligence, in whole or in part, prevails. But it does not prevail here at all (1). The doctrine of this court, like that of all courts that entirely discountenance comparative negligence, is that contributory negligence of the plaintiff, however slight, precludes his recovering in an action grounded on the defendant's negligence, however great such negligence may have been. In this we do not refer to wilful misconduct of a wrongdoer, which has come to be spoken of as gross negligence, meaning, however, intent, actual or constructive, to do the injury, and not negligence at all, strictly so called. The doctrine of contributory negligence applied here has the sanction of the common law from time immemorial, the support of most of the courts and standard text writers, and half a century of the adjudications of this court. To change it, otherwise than by legislative enactment, would be judicial usurpation. Therefore, it is idle to urge upon our attention authorities that cannot be applied except by such transgression.

Cases supporting each of the lines of comparative negligence, and the other rules to which we have referred, are presented here as bearing on plaintiff's right to recover, and many more might be found, especially in the inferior appellate courts of some of the States. Upon the faith of such authorities, it is believed, much money has been uselessly expended and false, unattainable hopes built up. Other courts have found it necessary, by vigorous language, to stay the tendency of such mischief. In a very recent case in Missouri the court used these emphatic words: "There is no comparative negligence in this State. The rule that the negligence of the plaintiff (want of ordinary care was undoubtedly meant) which contributed directly to the cause of the injury will prevent a recovery is without exception or qualification." The court was speaking of where recovery is sought on the ground of defendant's want of ordinary care. Hogan *v.* Citizens' Railway Co., 150 Mo. 36, 51 S. W. Rep. 473.

What has been said is addressed to the efforts of respondent's counsel to combat the main contentions upon which reliance is placed to secure a reversal of the judgment, viz., that the verdict finds and the evidence shows as a matter of law, contributory

1. See Bolin *v.* Chicago, St. Paul, Minn. & Omaha R'y Co. (Wis., December, 1900), 9 Am. Neg. Rep. 209, *ante*, where cases bearing on the various degrees of negligence are fully discussed by MARSHALL, J.

See also note on the Doctrine of Comparative Negligence, 9 Am. Neg. Rep. 249–252, *ante*.

negligence. Against that the authorities were cited, among others, which we have seen fit to criticise in a general way only, there being too many of them to warrant a review thereof in detail. We will reserve the discussion of the grounds put forth by appellant's counsel to support their main point, and the reasons for the conclusion we have arrived at, for the closing subject of this opinion.

It does not appear to be contended that there was not evidence sufficient to carry the case to the jury on the subject of whether the car was run at a negligent rate of speed and whether such fact, under the circumstances, was a proximate cause of the injury; so we need not discuss that question, though it is proper to say, in passing, that the situation disclosed by the evidence fairly raised a jury question as to each of such elements.

Some complaint is made because the court refused to submit questions requested by counsel for appellant, but it does not seem that there is any merit therein, as all the facts in issue were fully covered by the special verdict.

Complaint is also made because the court neglected to instruct the jury in regard to the duty of plaintiff to look and listen before going upon the railway track, in accordance with the suggestions contained in the questions. Also because of instructions which the court did give on that subject. In answer to such complaints, it is sufficient to say that the evidence is undisputed that plaintiff did both look and listen for a car coming from the south on the east track, before he attempted to cross it, and that he neither saw nor heard a car; and the circumstantial evidence and the verdict are consistent therewith. So it must be said that the evidence clearly shows that, at the instant when plaintiff started to cross, the coming car that did the injury was obscured from his view by the car standing at the south crosswalk. The jury found as a fact, on conflicting evidence, that the car gong was not sounded. In view of such undisputed facts and the fact found by the jury, if error was committed either in the instructions in respect to plaintiff's duty to look and listen for a coming car and to see and observe the speed thereof, or in refusing instructions in regard thereto according to the suggestions contained in the questions which appellant's counsel requested the court to submit to the jury, no harm resulted to it therefrom. So the case comes down to what we have said is the main contention.

Appellant's counsel insist that the verdict indicates such contributory fault, because the reasonable meaning of the finding that the motorman ought, in the exercise of ordinary care, to have seen respondent in time to have avoided the injury, is that he ought to

have seen him before the view was cut off by the standing car, in which case, obviously, plaintiff ought at the same time to have seen the coming car and not started across the track. We do not think counsel's idea of the meaning of the verdict is correct. Taking the finding in connection with that in regard to the dangerous speed of the car, and in connection with the undisputed evidence, it is very clear that what the jury meant was, that if the motorman had been operating his car at a reasonable rate of speed, under the circumstances, he would have seen plaintiff upon the track in time to have checked it and thereby avoided the injury. In that view, the finding as to the motorman's failure of duty in not seeing respondent is perfectly consistent with the finding of freedom from contributory fault on the part of the latter in failing to observe the car in time to keep out of its way.

To further support the main contention, it is insisted that respondent, as a matter of law, not only should have looked for the coming car from the south on the east track before he started to cross, but should have seen the car that did the mischief if it was within the line of his vision looking by the front end of the car located at the south crosswalk, and that if it was not, because it had passed out of view within the territory shut out from observation by the stationary car, he should have anticipated the probability of a car being so located and not attempted to cross the tracks until such stationary car moved on; that is, that the rule of law requiring a person to look and listen for a coming car before entering upon a railway track, includes the duty not only to discover what is observable by the senses of seeing and hearing, but the duty to use such senses when and where they will be reasonably certain to discover the existence of a car dangerously near the crossing, if there be one. No fault can be found with the rule, but, applying it to the evidence as a test of plaintiff's conduct, in view of other settled legal principles, we still have difficulty in saying that there was not a fair question of fact left for the jury to solve. The industry of counsel for appellant has not been rewarded by discovering precedents which may be referred to as material aids in solving such difficulty; and our labor to that end has not met with any more satisfactory result. Counsel for respondent has not been more successful. The cases cited to our attention by the latter, the strongest of them being from inferior appellate courts, to the effect that respondent was not bound to wait for all the cars that might be coming to pass by — that he had as much right to use the crossing so as to make defendant check the car to allow him to pass over the tracks as appellant had to delay respondent in order to allow

the car to pass over the crossing — are not useful. Such expressions, found in legal opinions to support decisions, do not accurately state the law. They proceed on a misapprehension of the relative rights of street-car companies and ordinary travelers, and have a mischievous effect. Such travelers have only the common right, while a railroad company has special rights granted to it by the State through the municipality as its agent. The public thoroughfares are under the control of such public agencies, to be used in such reasonable ways as their appropriate governing bodies may determine not inconsistent with the original design. In the exercise of undoubted power, the common council of the city of Milwaukee granted appellant, or some person under whom or corporation under which it claims, the right to maintain and operate its double-track street railroad, and, so far as appears from the evidence, without any restrictions as to the speed of the cars or the manner of crossing streets. Such granted rights contemplated rapid transit within reasonable limits, and that ordinary travelers on the street should, to a reasonable extent, shape their conduct with regard thereto. In the use of its granted rights appellant is considered a public agent. It has, impliedly, such privileges as are reasonably necessary to effect the object of its grant. In order that it may enjoy such privileges, ordinary travelers, when upon its track, should give way for the passage of cars and be ready to do so in order not to delay the transit thereof. They ought not to go upon the track if a car is approaching at a lawful rate of speed and reasonable opportunity does not exist to pass over in safety. If the car is approaching at a negligent rate of speed, and the traveler observes it or ought reasonably to do so, such negligence will not justify a traveler in breaching his duty, to exercise ordinary care for his own protection, by placing himself in the way of such car.

The traveler's duty, confining it to a street crossing of a street-car track, is stated by the Supreme Court of New Jersey substantially in this way: "The driver of a team in crossing a street-car track has the right of way if, by proceeding at a rate of speed which under the circumstances of time and locality is reasonable, he will reach the place of crossing in time to safely go upon the track in advance of an approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped, before it will reach him; that is, if the driver, proceeding reasonably under all the circumstances, enter upon the track, having exercised reasonable judgment as regards the time necessary to stop the car before reaching him, he is not guilty of any breach of ordinary care, even though it shall turn out that he has miscalculated." Railway Co. *v.* Miller,

59 N. J. Law, 423, 36 Atl. Rep. 885, 39 Atl. Rep. 645. Respondent's counsel relies on that and similar cases. It should be said in passing that the court, in connection with stating the rule as indicated, approved a charge given by the trial court to the effect that a person, in approaching a street-car track for the purpose of crossing the same, where his view is impeded by vehicles or he cannot see up the track, should wait till he reaches a point where his sight is not impeded, before going upon the track; that he ought to be able to see far enough up the track to see that he has the right of way. To that the trial court added this test of when such right of way exists: He has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed. That was condemned by the appellate court because of two elements: First, that indicating a right on the part of the traveler to get in the way of a coming car by his activity and compel the person in charge thereof to check its speed; second, the right to ignore the actual speed of the car however plainly observable. The true test was given in substance as before indicated, omitting the element permitting the traveler to run a race with a car in order to go upon the track in advance of it, and that permitting him to ignore the unusual rate of speed, but retaining the idea that the traveler need not check his speed to allow a car to pass, but traveling at a usual rate may go in front of it, giving time only for the motorman to stop it if need be before it will reach him. It is in the nature of an amendment of street-car franchises. Certainly, such privileges as are reasonably necessary to the discharge of the duty of a street-car company to the public in transporting persons from place to place on the street, in the way in which such business is ordinarily conducted, are incident to the franchise to maintain and operate the road, in the absence of municipal regulations or something in the franchise or some State police regulation to the contrary. In the absence of any such regulation, the purpose of such a utility is so inconsistent with every traveler upon the street where it exists having the right to go upon the track in advance of a coming car by merely calculating on the time necessary for the car to be stopped before reaching the crossing, that it is not perceived how a court can say that such right exists without exercising legislative functions and judicially, in form, restricting the plain intent of the legislative grant. The test of the ordinary traveler's right in crossing a street-car track, to harmonize reasonably with the spirit of an unrestricted franchise to maintain and operate, as regards the rights of other users of the way, may properly be stated thus: A person desiring to cross a street-car track in advance of an

approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track, the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else.

We are not unmindful of the fact that the rule stated places quite a burden upon the ordinary use of the streets by persons traveling thereon in the ordinary way, especially where there are double tracks with center supporting poles and cars passing both ways at short intervals; but that is one of the incidents of our modern civilization. Everything must move fast. People as a rule will not tolerate anything else. Street-car companies are expected to conform to the public demand in that regard, and are granted franchises, as indicated, in that view. The dangers that result are great and constant. The army of dead and maimed because of such dangers is numerous and being daily added to. But a remedy must not be sought by appealing to courts to change established rules of law in order to indemnify the sufferers; but by appealing to the lawmaking power for such regulations of the construction and operation of street railroads, and the use of streets for such purpose, as will concur with and render such use more in harmony with their safe and convenient use by ordinary travelers, leaving courts to administer justice for wrongs committed notwithstanding, according to the law as they find it.

Now when we apply the test above indicated to respondent's conduct, the difficulty with saying he was guilty of contributory negligence by no means disappears. We must keep in view the peculiar situation he was in when and just before he started to cross the track, in determining whether there was a breach of duty on his part in not discovering the coming car, or waiting till he had opportunity therefor. The east track south, looking by the south end of the stationary car, was observable for a distance of probably 100 feet at least; we cannot say further with certainty, in view of the

evidence as to the storm that was in progress and other conditions. The track was observable, looking directly east and southeast, by the north end of the stationary car, for a distance of about forty feet. Between the two parts of observable track there was a space of about sixty feet that was obscured by the standing car. From a point where the car came into view from the south till it passed out of view in the region obscured by the stationary car, at the speed it was moving, it took only about six seconds. As respondent came to a stop on the west side of the street, he saw a car approaching from the south as well as one from the north, and waited for them both to pass. The one from the north passed first. As soon as the one from the south was clear of the crossing, he looked again both ways, and not observing any car approaching from the south, but seeing one coming from the north, a sufficient distance away, however, to enable him to safely cross the tracks, he started. In the time it took for the first car from the south to pass over the crossing, and while respondent was waiting for it to so pass, the six seconds reasonably elapsed necessary for the second car from the south to come into view, pass over the track that was observable to the south, and enter the region of obscurity behind the stationary car, so that when respondent looked before starting to make the crossing there was no moving car in view, south. He made the start supposing that it was safe to do so.

There was no breach of duty to look both ways and listen. Was it, as a matter of law, want of ordinary care on the part of respondent not to have anticipated the probability of a car being obscured from his sight within the sixty feet of space he could not see by reason of the stationary car? It seems that the term "probability" should be changed to "possibility" in view of the verity in the case that the car was going at an unusual rate of speed, so that it came into and passed out of sight in a few seconds of time. That would be placing the standard of ordinary care, which one must exercise as a matter of law, higher, as it seems, than any established rule of law with which we are familiar will permit, or any precedent, that has been cited to our attention or that we have been able to discover, will justify. If the track had been obscured from the region of the crossing south for substantially all of the way within which an approaching car could otherwise have been seen, and would have been as a matter of law, dangerously near as regards plaintiff's crossing the track, the situation would be far different. It was to such a circumstance, among others, that the attention of the court was directed in Railway Co. *v.* Miller, *supra*. The same is true of Langhoff *v.* Railroad Co., 19 Wis. 489. There two trains were

approaching on parallel tracks and substantially side by side, one of the trains being obscured from view by the other, and the track on which it was moving, except from the crossing to about the head of the observable train, was all out of view; yet the court held that the plaintiff was not guilty of want of ordinary care in not anticipating the probability of there being a second train obscured from the injured person's point of observation by the one that was in sight. The situation was similar, on principle, in Railway Co. *v.* Block, 55 N. J. Law, 605, 27 Atl. Rep. 1067; Oleson *v.* Railway Co., 143 Ind. 405, 42 N. E. Rep. 736; Hovenden *v.* Railroad Co., 180 Pa. St. 244, 36 Atl. Rep. 731; and other cases cited by appellant's counsel, and many others to be found in the books. They are analogous to Johnson *v.* Railway Co., 91 Wis. 233, 64 N. W. Rep. 753, where the railway track, except at the crossing and the immediate vicinity thereof, was obscured from view by the curtains of the driver's vehicle.

There is nothing in what has been said, nor the conclusion here reached, militating against the rule that a person, approaching a railway track with a view of entering upon it, must look both ways and listen, and that the performance of that duty is not excused by negligence on the part of the railway company, and that the duty to look and listen includes that of performing such duty when and where it will be reasonably certain to effect its purpose, as laid down by standard text writers, numerous decisions of this court and most of the courts elsewhere. Elliott, R. R., sec. 1166; Cawley *v.* Railway Co., 101 Wis. 145, 77 N. W. Rep. 179; Oleson *v.* Railway Co., *supra.* This decision goes no further than that, under the circumstances of this case, — the most significant being that a car had just passed by on the east track, that the entire track within which an approaching car would have been dangerously near was in view except a small space thereof over which a car going at the speed of the one in question would pass in four seconds, and that no signal of the presence of the car was given, — it is susceptible at least of a reasonable inference that the attempt to cross the track on the theory that a car was not hidden from view in such short space, was not inconsistent with ordinary care. That raised this question of fact: What was the proper inference to be drawn? It was the province of the jury to solve that question. Every principle of law bearing on the case seems consistent with this conclusion, and all light obtainable from precedents also consistent.

The judgment of the Superior Court is affirmed.

BROWN v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Supreme Court, Wisconsin, February, 1901

ACCIDENT AT CROSSING — DRIVING — "STOP, LOOK, AND LISTEN" — SIGNAL — STATUTORY REGULATIONS. — 1. If a person approaches a railway track to cross or enter upon it, ordinary care, as a matter of law, requires him, before doing so, to look and listen for a coming train, and, if there is one in plain sight or hearing, so circumstanced as to suggest reasonable probability of danger for such person to proceed, to discover such situation and not to go upon the track till the danger is past (1).

2. The rule above stated is absolute, so that a person about to enter upon a railway track is chargeable with knowledge of such dangers as he may reasonably discover by the use of his sense of sight and that of hearing. Neither violation of statutory regulations on the part of the railway company as regards the speed of its trains or signaling the approach thereof, nor any other negligent act on its part, nor mere diversion of attention on the part of the injured person will excuse him from the performance of his duty to care for his own safety.

3. Failure on the part of a railway company to comply with statutory regulations as to the speed of its trains in running through a village, or failure to signal the approach thereof to a street or highway crossing as the law requires, is negligence *per se*, but not necessarily actionable negligence at the suit of one injured by such a train.

4. In the circumstances last above stated, the mere unlawful act does not constitute actionable negligence unless the injury be proximately caused thereby, without want of ordinary care on the part of the injured person contributing thereto.

5. The mere intentional running of a railway train contrary to police regulations, designed to promote the safety of persons in crossing the track, does not constitute actual or constructive intent to inflict an injury upon such a person, so that if he is injured thereby he may recover compensation therefor regardless of his own contributory negligence.

(Syllabus by the Judge.)

APPEAL from Circuit Court, Dane County.

Action by Charles N. Brown, administrator, against the Chicago and Northwestern Railway Company. Judgment for defendant, and plaintiff appeals. *Judgment affirmed.*

"Action to recover compensation for loss sustained by plaintiff's intestate, August Zilmer, through the alleged wrongful conduct of defendant's servants in running one of its passenger trains in the

1. See also, Tesch *v.* Milwaukee Electric R'y & Light Co. (Wis.), preceding case reported herein. See also, Note on the Rule of Stop, Look and Listen, at end of this case.

night-time at an unlawful rate of speed across a public street in Deerfield, in Dane county, Wis., a duly organized village of such county, without giving any signal of its approach to such crossing by sounding the engine bell or whistle, whereby the intestate, while attempting in the exercise of ordinary care, as claimed, to pass over the crossing, driving a single horse hitched to a light wagon, was injured so severely as to cause his death within a short time after the injury was received. The controverted issues on the pleadings were, mainly, whether defendant's servants were guilty of wrongful conduct causing the injury to Zilmer, if so guilty the degree of such guilt, — as to whether it was mere negligence or wilful misconduct, — and whether deceased was guilty of a want of ordinary care that contributed to the fatal result. On the trial the following appeared to be undisputed facts: The place where the accident occurred was on one of the principal streets of the village of Deerfield. The time of the accident was about ten o'clock P. M. on the 29th day of August, 1895. Zilmer was a farm hand. He had driven into the village with several young girls as companions, in the early part of the evening. About ten o'clock thereafter he started to return home with his party. The place of starting was from ten to twenty rods from where the accident occurred. The night was clear and not very dark, though there was no moonlight. About as the start was made, the train that caused the accident signaled its approach to the depot, which was near where the accident occurred, by sounding the engine whistle. Such signal was heard by many persons circumstanced no more favorably for that purpose than Zilmer. The train was a regular passenger train, due according to schedule time to pass through the village without stopping, at about the time Zilmer started on his way home. He was well acquainted with the situation of the railway tracks at the point where he was injured. From the place where he started, as before stated, till he received his injury, according to all the direct evidence, he drove his horse on a slow trot without making any effort whatever to inform himself as to the approach of a train. As his horse was about to step upon the main track it was struck by the train, which was coming from the east, moving at from twenty to forty miles an hour, and he was fatally injured. The street crossed the railway track at about right angles. From the point where deceased started, to the region of the railway right of way, it was a little down grade. Zilmer's starting point was south of the railway crossing. There were three tracks. The first one reached was a side track, located about fifty-two feet from the main track. About midway between such side track and the main track was a second side track. From

the point where the traveled roadway crossed the first side track, a person could see an approaching train from the east, on the main track, for a distance of about 630 feet. As the train that did the injury approached, it made sufficient noise to attract the attention of persons within a radius of several hundred feet of the crossing. There was no opportunity, for one circumstanced as Zilmer was, to see the approaching train till he arrived at a point on or just over the first side track. From that point on, until the main track was reached, a person looking east along the main track could see a coming train after it reached a point about 630 feet from the crossing. For that distance there was nothing to obstruct the view. Three young men were approaching the crossing a little ahead of Zilmer. All of them heard the engine whistle for the station, and the noise of the train a little before it came into sight, and, being on their guard against injury by it, they stopped before reaching the main track to allow it to pass. After they crossed the first side track and were in the vicinity of the second, they observed the coming train. Zilmer was then just crossing the first side track. They observed him at that instant, driving towards the main track, apparently regardless of the danger, and called out to acquaint him of the presence thereof. Some person from across the track also called a warning to Zilmer. He did not appear to notice any of the warnings. When nearly opposite the young men, one of them stepped towards the horse and called out "Whoa," but it was then too late to stop it. If Zilmer observed the train at all, it was for only an instant before the collision. The appearances were that he was entirely unconscious of the danger till the accident occurred. There was evidence tending to show that the 10:06 P. M. train customarily passed through the village at an unlawful rate of speed, and that there were no rules promulgated by the defendant inconsistent therewith. Also that if a train were moving at a rate of forty miles an hour there would not be sufficient time to stop it from the instant of its reaching a point where a person in the engine cab could observe the track and the vicinity thereof up to the crossing to the instant when the accident occurred. There was some conflict of evidence as to whether the engine bell was sounded as the train approached the crossing. The following is in substance the testimony of the three young men before mentioned: William Kroneman said: "I heard the 10:06 P. M. train whistle just as we crossed the second side track. We saw the train coming around the curve. At that instant I saw Zilmer coming back of us and heard Quammen and Howe of our party call to him. The rig was then on the south side track, coming at the rate of about six miles

an hour. Zilmer did not appear to hear the warning my companions gave to him. He did not slacken the speed of his horse. The horse was trotting when I first observed him, and continued to trot right up to the instant the accident occurred." Frank Howe said: "I heard the whistle when I was at the south side track. We saw the train coming when we were at the middle track, the second side track. When we were a little further I saw Zilmer crossing the first side track and I hollered at him. He did not appear to hear me, but allowed his horse to trot right up to the point where the collision occurred." Herman Kruger said: "I heard the noise of the train when I was a little way over the first side track. I did not cross the main track till the train passed. At the time I heard the train Zilmer was coming about a rod and a half behind me. When the rays of the headlight showed on the rails of the main track at the crossing, Zilmer was still about a rod behind me and not quite clear of the first side track. As the horse got about opposite me I took about three steps toward him and said 'Whoa.' There was not then time for me to stop the horse, so I stopped myself. The horse kept right on trotting up to the main track where he was struck by the train." All the other direct evidence corroborated the three witnesses whose testimony has been given. At the close of the evidence the court granted a motion for a nonsuit upon the ground that the evidence showed conclusively that Zilmer was guilty of contributory negligence. Judgment was thereafter rendered dismissing the complaint and for costs in favor of defendant."

BUSHNELL, ROGERS & HALL, for appellant.

EDWARD M. HYZER, for respondent.

MARSHALL, J. (after stating the facts). — Counsel contend that the evidence does not show contributory negligence as a matter of law. We shall not take time to follow the learned counsel in their ingenious reasoning on that point. The evidence is perfectly clear that the deceased had ample opportunity to discover the danger which resulted fatally to him, and that he drove his horse recklessly into it. He did not make any attempt to discover the coming train, though it must have been in sight when he was at least forty feet from the crossing. The evidence shows one of the most reckless attempts to cross a railway track, regardless of the danger which it in law and in fact suggests, that can be found in the books.

It is further contended that contributory negligence was not a defense, because the train that did the injury was running at an unlawful rate of speed and according to a custom of its servants known to and approved by it. It is argued that the injury to

deceased, under the circumstances, should be considered as having been wilfully inflicted by defendant. What constitutes a wilful injury has been so recently fully discussed in this court that we do not feel justified in going over the subject at this time. Bolin *v.* Railway Co. (Wis.) 9 Am. Neg. Rep. 209, 84 N. W. Rep. 446 (1).

There is no evidence here that the defendant saw the deceased in a place of peril and purposely or recklessly ran the train regardless thereof, or that the train was operated with such an utter disregard of the safety of persons using the highway as to indicate a willingness to injure them. The evidence shows merely that the speed of the train was in excess of that allowed by law. That comes far short of showing actual or constructive intent to injure. The act was negligence *per se* (Elliott, R. R., sec. 1095, note 1; Smith *v.* Exchange Co., 91 Wis. 360, 64 N. W. Rep. 1041), but not necessarily actionable negligence. To constitute an actionable wrong, the conduct must be the proximate cause of an injury, without any want of ordinary care on the part of the injured person contributing thereto. There are a large number of cases in the books involving injuries to persons by railroad trains while being operated contrary to law, and it will be found that such a circumstance is uniformly held to be evidence of negligence, not of intent, actual or constructive, to injure. Elliott, R. R., sec. 1204; White *v.* Railroad Co., 102 Wis. 489, 78 N. W. Rep. 585; Schneider *v.* Railroad Co., 99 Wis. 378, 75 N. W. Rep. 169. In the latter case, the point upon which appellant's counsel mainly rely here was urged upon the attention of the court, viz., that where a person is injured by the act of another that is prohibited by statute, the latter is liable to the former for the resulting damages regardless of the question of contributory negligence. The unlawful act involved was that of running a railway train contrary to statutory regulations. The court decided that the legal restraint put upon a railroad company, as regards the running of its trains, does not relieve a traveler upon the public ways from the duty to use ordinary care for his own safety; that such restraint goes no further than to render the company refusing or neglecting to submit to it liable to the penalty imposed, and to the charge of negligence as a matter of law in a civil action, leaving a person injured by reason of such negligence remediless the same as in any other case of negligence if he contributes to his injury by his own want of ordinary care. It seems that we need not say more in this case.

The judgment is affirmed.

1. See the Bolin Case, 9 Am. Neg. Rep. 209, *ante*, where Marshall, J., discusses fully the various degrees of negligence.

NOTE ON THE RULE OF "STOP, LOOK, AND LISTEN."

In connection with the Wisconsin case of BROWN *v.* CHICAGO AND N. W. R'Y Co. (preceding case reported), the following cases, all comparatively recent, will be of interest in relation to the rule of "stop, look, and listen," in personal injury cases arising out of accidents at railroad crossings and in crossing street-car tracks.

Duty of traveler to look and listen before crossing railroad track.

A person about to cross a railroad track must both look and listen for approaching trains before attempting to cross the track, and, if a pedestrian, he must not merely content himself with looking while at some distance from the track, but must look again when close to the track.

In Brown *v.* Chicago & N. W. R'y Co. (Wis.), 9 Am. Neg. Rep. 403, *ante*, the rule as to "looking and listening" is stated as follows: "If a person approaches a railway track to cross or enter upon it, ordinary care, as a matter of law, requires him, before doing so, to look and listen for a coming train, and, if there is one in plain sight or hearing, so circumstanced as to suggest reasonable probability of danger for such person to proceed, to discover such situation and not to go upon the track till the danger is past."

And in Tesch *v.* Milw. Elect. R'y & Light Co. (Wis.), 9 Am. Neg. Rep. 388, *ante*, the rule is thus stated: "Before crossing a railway track, regardless of whether it be a steam or electric street railroad, a person should look both ways and listen for a coming car and perform that duty when and where it will be reasonably certain to effect its purpose; and diversion of attention, generally speaking, will not excuse the performance of such duty; neither will misconduct on the part of the railway company."

In Fletcher *v.* Railroad Co., 149 Mass. 127, it is stated: "As a general rule, a person is not in the exercise of due care who attempts to cross a railroad track without taking reasonable precaution to assure himself, by actual observance, that there is no danger from approaching trains."

It was said by the court in Blaker's Ex'x *v.* Receivers, 30 N. J. Eq. 240: "A person intending to cross a railroad track is bound to look and listen for an approaching train; and if he sees or hears a train approaching, and then daringly assumes the hazard of attempting to cross in advance of it, and fails, he must bear the consequence of his folly." Similar language was used by Mr. Justice Field in Chicago, R. I. & P. R. R. Co. *v.* Houston, 95 U. S. 697, 702, 7 Am. Neg. Cas. 345, 348. The same was held in Burnett *v.* Railroad Co. (N. J. Sup.), 39 Atl. Rep. 663, and in State *v.* Cumberland & P. R. Co. (Md.), 39 Atl. Rep. 610.

In Fitzhenry *v.* Consolidated Traction Co. (N. J.), 8 Am. Neg. Rep. 288, child nine years old crossing street-car track struck by street car, it was held that the salutary rule of duty which requires the ordinary traveler in crossing a street railway to use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, is also binding upon a child that is *sui juris*. Citing Railway Co. *v.* Flanagan, 57 N. J. L. 518; Brady *v.* Traction Co. (N. J.), 7 Am. Neg. Rep. 474; Railroad Co. *v.* Righter, 42 N. J. L. 180.

In Schneider *v.* Northern Pacific R'y Co. (Minn.), 9 Am. Neg. Rep. 74, pedestrian injured at railroad crossing, it was held that a pedestrian passing over a

street at a city railway crossing is not relieved from the use of any of his faculties to discover danger, and it is his duty, if he is unable to hear warning signals, to use his eyesight, if that sense would disclose such danger; and a failure to do so must be held to display want of ordinary care on his part. Held, also, that neglect to take notice of an approaching engine on a steam railway track a person is about to cross, which could have been seen before going upon the same, cannot be excused by the failure of the railway company to comply with an ordinance requiring the maintenance of gates and a flagman at that place.

See also the following cases: St. Louis, I. M. & So. R'y Co. *v.* Spearman (Ark.), 3 Am. Neg. Rep. 516; Briscoe *v.* Southern R'y Co. (Ga.), 3 Am. Neg. Rep. 360; Hilts *v.* Foote, Rec'r (Mich.), 9 Am. Neg. Rep. 111; Gallagher *v.* Manchester St. R'y (N. H.), 9 Am. Neg. Rep. 112.

Traveler not excused from duty of looking and listening by misconduct of railway company.

In Railroad Co. *v.* Howard, 124 Ind. 280, an instruction that, if the whistle was not sounded nor the bell rung, this was a circumstance tending to show want of contributory negligence, was held erroneous.

In the recent case of Hearn *v.* Railroad Co. (Md.), 43 Atl. Rep. 59, 6 Am. Neg. Rep. 168 n, the Maryland court held that a traveler in a closed vehicle, who attempted to cross a railroad without stopping, looking, and listening for an approaching train, was negligent, and that the failure of the trainmen to give the required signals did not excuse his failure to exercise such precautions.

It was held in Grostick *v.* Railroad Co., 90 Mich. 594, "that a person about to cross a railroad track is bound to recognize the danger, and to make use of the senses of hearing and sight, and to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk, and such conduct should be pronounced negligence by the court as matter of law." In that case the declaration alleged, and the plaintiff's evidence tended to show, that the defendant was guilty of negligence in not continuously giving signals for forty rods before reaching the crossing, as the statute required.

The New Jersey court holds that the failure of the defendant to give signals will not relieve the traveler from his duty. Railroad Co. *v.* Righter, 42 N. J. L. 180.

It was held in Blackburn *v.* Southern Pac. Co. (Oregon), 55 Pac. Rep. 225, that when the deceased, without stopping his vehicle for the purpose of listening for approaching trains, attempted to drive across a railroad track in a city street, at a crossing with which he was familiar, and from which the view of the approaching train was obstructed, and was killed by a train while making such an attempt, a verdict should be directed for the railroad company, although the traveler was approaching the crossing at a slow walk, and the train was running at an unlawful rate of speed; that a failure to stop and listen before attempting to cross, under such circumstances, was negligence *per se*. The opinion reviews the leading cases upon this subject, and contains a clear statement of the law.

See also Tesch *v.* Milw. Elect. R'y & Light Co. (Wis.), 9 Am. Neg. Rep. 388, *ante*; Schneider *v.* Northern Pac. R'y Co. (Minn.), 9 Am. Neg. Rep. 74.

Rule as to person approaching crossing when riding or driving.

As a general rule, a person riding or driving, must look and listen at such

distance before crossing track as will enable him to control his team, and must continue to look and listen until he has crossed track, but there is no arbitrary rule requiring him to look constantly, such requirement being determined by circumstances.

Illustrations.

In CHICAGO AND ERIE R. R. CO. *v.* THOMAS *(Indiana, December, 1900)*, 58 N. E. Rep. 1040, an action for the negligent killing of plaintiff's intestate at a street crossing on defendant's railroad, judgment for plaintiff was reversed. The court (per DOWLING, Ch. J.), said: "It is evident from the answers to the interrogatories that the place where the decedent attempted to cross the railroad tracks was one of extraordinary peril, requiring the exercise on the part of the traveler of extraordinary care. The number of tracks, the obstructions which prevented approaching trains from being seen, the temporary increase of the danger by the presence of the freight train which had been cut in two on one of the tracks, the state of the weather, and the lateness of the hour admonished the decedent that only by the exercise of unusual vigilance could his safety in crossing be secured. It appears from the answers to the interrogatories that he exercised no caution whatever. If there had been but a single main track, his conduct in crossing it would have bordered upon recklessness. His seat was low, the vehicle on which he rode of a somewhat unwieldy character, and his horses were a considerable distance in advance of the place where he sat. At such a place, and under such circumstances of evident danger, it would seem that the decedent should have gone in advance of his team, and made careful observation of his surroundings, before he placed himself in a situation of danger from which he could neither safely advance nor retreat. As the noise made by the locomotive of the freight train prevented him from hearing the noise of the approaching train, the necessity for looking up and down the track from some position which enabled him to see an approaching train in time to avoid it became all the greater. It was incumbent on the appellee to show that his decedent was free from contributory fault, and that the accident resulted exclusively from the negligence of the appellant. The answers to the interrogatories unmistakably proved that the injury to the decedent was the result of his own want of care. The fact that the persons in charge of the locomotive failed to sound the whistle and ring the bell, as required by the statute, did not excuse the decedent from the exercise of the caution and vigilance demanded by the known perils of the crossing. Korrady *v.* Railway Co., 131 Ind. 262, and cases cited; Cadwallader *v.* Railway Co., 123 Ind. 518; Smith *v.* Railroad Co., 141 Ind. 92; Engrer *v.* Railway Co., 142 Ind. 618. Our conclusion is that the court erred in overruling the motion of the appellant for judgment upon the answers to the interrogatories notwithstanding the general verdict, and for that error the judgment is reversed, with instructions to the Huntington Circuit Court to vacate the judgment, and grant a new trial, and for further proceedings not inconsistent with this opinion." HADLEY, J., in dissenting opinion, said: "The exercise of due care at a railroad crossing requires the traveler to look and listen before going upon the track. This is undoubtedly the general rule. There are exceptions. The law requires no foolish thing. That which will be ineffectual is excused. Therefore, if, by looking, Platt could not have seen, or by listening he could not have heard, the approaching train in time to have avoided the accident, neither was required. He was only called upon to employ such agencies of information as the perils of the place fairly demanded, and as

were calculated to disclose such danger as might be reasonably apprehended from the situation as it then and there appeared. Railway Co. *v.* Burton, 139 Ind. 357." Continuing, HADLEY, J., said: "The failure to look and listen before entering upon the railroad crossing, when the eye and ear may clearly be useful in discovering the approach of trains in time to avoid injury, is negligence *per se*, and belongs exclusively to the court to characterize; but when extraordinary conditions exist to make the question of effectual seeing and hearing doubtful, and when unusual and unexpected appearances suddenly arise at a crossing, either of safety or peril, which are naturally inclined to control differently the conduct of equally prudent persons in like places, so that ordinary conduct in such situation may be the subject of more than one inference, and lead to an honest difference of opinion among men of equal intelligence and prudence, then in such cases the question of negligence or due care is not one of law, but one of fact for the jury. Railroad Co. *v.* Welborn, 127 Ind. 142, and cases cited; Railway Co. *v.* Harrington, 131 Ind. 426; Railway Co. *v.* Grames, 136 Ind. 39, 50; Railway Co. *v.* Moneyhun, 146 Ind. 147; Railroad Co. *v.* Cox, 8 Ind. App. 29; Railway Co. *v.* Burton, 139 Ind. 357, 373; French *v.* Railroad Co., 116 Mass. 537; Huckshold *v.* Railway Co., 90 Mo. 548; Railway Co. *v.* Lee, 70 Tex. 496; Teipel *v.* Hilsendegen, 44 Mich. 461.

In CARTER *v.* CENTRAL VT. R. R. Co. *(Vermont, April, 1900)*, 47 Atl. Rep. 797, an action to recover damages for personal injuries received by plaintiff while driving across defendant's railroad track at a highway crossing, the rule was stated by TYLER, J., as follows: "The duty of a traveler on arriving at a railroad crossing to look and listen for an approaching train seems too obvious to require judicial declaration, yet it has been stated in numerous cases. Some courts go further, and make it the traveler's duty to stop and look and listen; but the rule requiring the traveler to stop, though a wholesome rule, cannot well be adopted as one of general application, for in some localities the traveler can see the track so great a distance that he can determine by the sense of sight whether or not he can safely cross, as in Manley *v.* Canal Co., 69 Vt. 101, 37 Atl. Rep. 279. But when the view is obstructed it may be his duty to stop, in order to listen effectually, and especially is this the case when his hearing is obstructed by the noise of his own carriage, or by objects situated between him and the track. It has so often been stated that the traveler must approach a railroad crossing with his senses of sight and hearing alert for danger that it may be said to have become a maxim. When the situation is such that one of these senses cannot be fully used, he must be more alert in the use of the other. By the impairment of these senses or either of them, or by the intervention of objects to obstruct his sight or hearing, ordinary care may require him to stop in order to ascertain with reasonable certainty, before driving upon the track, that a train is not approaching. Manley *v.* Canal Co., *supra*." Judgment on verdict for defendant was affirmed, there being no evidence tending to show that defendant did not do what it could to avoid disaster after it discovered plaintiff in a position of peril. "The plaintiff testified that he was 'watching' for a train as he drove along. Assuming that the term implies that he was both looking and listening, and that he continued to look and listen until he drove upon the track, his subsequently detailed account of the occurrence shows that he was not watching vigilantly for a train before the action of his horse attracted his attention to it. He could not have watched effectually with his sense of hearing without stilling the noise of his team. Besides, as the track northward could be seen for so short a distance, common prudence

required him to make diligent use of his senses to ascertain whether a train was about to pass."

In Carter *v.* Central Vt. R. R. Co. (supra), the court (per TYLER, J.), in discussing and citing numerous cases on the rule, said "It was said in Improvement Co. *v.* Stead, 95 U. S. 161, that travelers upon a common highway which crosses a railroad upon the same level, and the railroad company running a train, have mutual and reciprocal duties and obligations, and that, although the train has the right of way, the same degree of care and diligence in avoiding a collision is required from each of them; that this right does not impose upon the traveler the whole duty of avoiding a collision, but is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of its approach; and that the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. This language is often quoted as an accurate and concise statement of the law respecting the correlative rights and duties of travelers and railroad companies. But the court evidently did not intend to excuse the traveler for his neglect of duty on account of the defendant's neglect; it expressly held in Chicago, R. I. & P. R. R. Co. *v.* Houston, 95 U. S. 697, 7 Am. Neg. Cas. 345, that the neglect of the engineer to sound the whistle or ring the bell on nearing a street crossing does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety; that, before attempting to cross the railroad track, he is bound to use his senses, — to listen and look, — in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. In the latter case the court did not hesitate to say from the record that, had the plaintiff used her senses, she could not have failed both to hear and to see the train."

In Sandberg *v.* St. Paul & Duluth R. R. Co. (Minn.), 8 Am. Neg. Rep. 259, it was held that, in crossing a steam railroad on a public crossing at a place where there were only double tracks, and the vision was unobstructed, the plaintiff was guilty of contributory negligence in looking but once, and that before reaching the tracks.

In Wosika *v.* St. Paul City R'y Co., and Shindelus *v.* Same (Minn.), 8 Am. Neg. Rep. 72, it was held that a person riding in a rear seat of a vehicle, having no control of the horses at the time, but is a joint contributor to the hire of the team for the occasion, is guilty of negligence if he does not look for approaching cars upon crossing a street-car track.

In Wosika *v.* St. Paul City R'y Co., and Shindelus *v.* Same (Minn.), 8 Am. Neg. Rep. 72, it was held that driver of vehicle was negligent in driving upon street-car track without looking for approaching cars.

In Central R. R. Co. of New Jersey *v.* Smalley, 61 N. J. L. 277, 4 Am. Neg. Rep. 197, action arising out of collision of train with team at crossing, it was held that the duty to look and to listen before crossing a railroad includes the duty to do that which will make looking and listening reasonably effective.

In Hoopes *v.* New Jersey & Seashore R. R. Co. (N. J.), 8 Am. Neg. Rep. 274, collision of train with team at railroad crossing, it appeared that plaintiff, while driving upon a public highway at night, noticed, as he drew near the crossing of defendant's railroad, a number of lights along the tracks towards the south,

but did not observe that any one of them was moving. In fact, one was the headlight of an engine which was approaching the crossing, and which ran the plaintiff down as he drove upon the tracks. No other danger was present to distract plaintiff's attention from this engine. Held, that in the exercise of ordinary prudence plaintiff should have looked with sufficient care to have detected the moving light, and then should have waited, before attempting to drive over the tracks, until either the moving light had passed beyond the crossing, or until he had satisfied himself that it was not the headlight of an approaching train; and that failure in that regard was negligence on his part which contributed to his injury.

In Keyley *v.* Central R. R. Co. of New Jersey, (N. J.), 7 Am. Neg. Rep. 452, the decisions in Merkle *v.* R. R. Co., 49 N. J. L. 473, Central R. R. Co. *v.* Smalley, 61 N. J. L. 277, 4 Am. Neg. Rep. 197, and Conkling *v.* R. R. Co., 63 N. J. L. 338, holding that it is negligence to drive across a railroad crossing without stopping, " where there are permanent obstructions to sight that would make danger invisible, and a transie it noise that would make it inaudible," approved and applied in this case where plaintiff, sitting in a baker's wagon, drove his horse on a trot, without stopping, over two of the tracks of a railroad crossing, of which there were more than fifteen, where he could not see a slowly moving coal car, which struck and injured him, on the next track.

In Dennis *v.* North Jersey St. R'y Co. (N. J.), 7 Am. Neg. Rep. 453, collision between street car and wagon at street crossing, it was held that " the principle of law is now well established, and must be applied, that it is not negligence *per se*, or negligence in law for a person driving a vehicle, in approaching a street crossing over which he intends to cross, to fail to look for an approaching street car in order to avoid danger from it. The question whether he was negligent or not must be submitted to the jury for them to determine as a question of fact."

In Frederick *v.* Fonda, Johnstown & Gloversville R. R. Co., 52 App. Div. (N. Y.) 603, 8 Am. Neg. Rep. 347, collision between team and sleigh and train at crossing, it was held that the question whether plaintiff was negligent in not looking up the track more than once before crossing, was for jury to determine and it was error to nonsuit.

In Vitelli *v.* Nassau Electric R. R. Co., 53 App. Div. (N. Y.) 639, 8 Am. Neg. Rep. 304, team of horses injured in collision with street car, it appeared that those in charge of the team looked down the street before driving upon the track as far as they could see, the view being somewhat obstructed; that the car was not in view until too late to avoid the collision; that the car came upon them very fast without warning and that the motorman was not in his proper position on car. *Held*, that it was error to nonsuit, the question of contributory negligence being for the jury to determine from the facts.

In Mo., Kan. & Tex. R'y Co. *v.* Ferris (Tex. Civ. App.), 7 Am. Neg. Rep. 616, collision between train and team at public crossing, it was held that a charge which told the jury that if there was a failure on the part of the deceased to " look and listen," and under the circumstances a person of ordinary prudence would have done so, such failure to " look and listen " would constitute negligence, was not erroneous, although it would have been more complete had it said " failed to look and listen or to do either."

In Silcock *v.* Rio Grande Western R'y Co. (Utah), 8 Am. Neg. Rep. 166, team run over at railroad crossing, it was held that where a person permits a team to stand upon a public highway in close proximity to a railroad track, or is

about to cross such track, he is bound to look and listen, in order to avoid an approaching train and the happening of an accident.

In Lenz *v.* Whitcombe (Wis.), 3 Am. Neg. Rep. 623, it was held that plaintiff was guilty of contributory negligence where, after stopping at a distance of 200 feet from a railroad crossing on a highway that approached the track at an angle of thirty degrees, he, without again looking, drove upon the track and was struck by a train, though it could have been seen by a person at any point within the highway within 500 feet of the crossing in the direction from which it approached for a distance of nine-tenths of a mile. PINNEY, J., said: "The rule is inflexible that a party approaching the track, intending to cross it, is bound to both look and listen, and a failure to do so is negligence, which disentitles him to recover if injured, in crossing, by the train."

See also Green *v.* Erie R. R. Co. (N. J.), 9 Am. Neg. Rep. 103; R. R. Co. *v.* Righter, 42 N. J. L. 180; Merkle *v.* R. R. Co., 49 N. J. L. 473; R. R. Co. *v.* Leary, 56 N. J. L. 705; R. R. Co. *v.* Smalley, 61 N. J. L. 277, 4 Am. Neg. Rep. 197; Conkling *v.* R. R. Co., 63 N. J. L. 338; Keyley *v.* R. R. Co. (N. J.), 7 Am. Neg. Rep. 452; Dotty *v.* R. R. Co. (N. J.), 8 Am. Neg. Rep. 93; Penn. R. Co. *v.* Pfuelb (N. J.), 3 Am. Neg. Rep. 433; Mapes *v.* Union R. R. Co. (N. Y.) 9 Am. Neg. Rep. 112; Bunnell *v.* R'y Co., 13 Utah, 314; Clark *v.* R. R. Co. (Utah), 59 Pac. Rep. 92; Koester *v.* Chicago & N. W. R'y Co. (Wis.), 7 Am. Neg. Rep. 698; Nelson *v.* R'y Co., 88 Wis. 392; Schneider *v.* R'y Co., 99 Wis. 378, 5 Am. Neg. Rep. 3, n; Cawley *v.* R'y Co., 101 Wis. 145; Vant *v.* R'y Co., 101 Wis. 363; Haetsch *v.* R'y Co., 87 Wis. 304, 310; Groesbeck *v.* R'y Co., 93 Wis. 505, 513.

"Stop, look, and listen."

In Pennsylvania a person is required to stop as well as to look and listen before crossing a railroad track, but this is not an invariable rule in other States, it being generally for the jury to determine from the facts whether plaintiff should have stopped as well as have looked and listened.

In Decker *v.* Lehigh Valley R. R. Co., 181 Pa. St. 465, 3 Am. Neg. Rep. 83, it was held that non-observance of the rule to stop, look, and listen, before driving across a railroad track, is negligence *per se*, and conditions which render a crossing dangerous do not authorize a departure from the rule.

In Baker *v.* Penn. R. R. Co., 182 Pa. St. 336, 3 Am. Neg. Rep. 603, it was held that one who attempts in broad daylight to cross the three tracks of a railroad upon the last of which is an approaching train, which could have been seen seventy feet away before she crossed the first track, 224 feet away before going on the middle track, and 900 feet away before stepping on the track on which the train was approaching, is guilty of contributory negligence, and no recovery can be had for her death caused by being struck by the train. An excerpt from the charge of the trial court is as follows: "It is a reasonable rule, and one founded on public policy, that every person about to cross the tracks of a railroad company must stop, look, and listen, before they attempt to go across, and they must not do this in a mere casual way, but must make an honest effort to see and hear, and thus avoid danger."

In Ritzman *v.* Phila. & Reading R. R. Co. (Pa.), 4 Am. Neg. Rep. 728, it was held that failure of plaintiff to "stop, look, and listen," before crossing defendant's railroad at grade is not merely evidence of negligence, but is negligence *per se*.

In Robertson *v.* Penn. R. R. Co. (Pa.), 1 Am. Neg. Rep. 166, it was held that

where a bicycle rider came to a railroad crossing, and a freight train passing at the time, he circled around until the train had passed, and then, without dismounting, he started across the track without looking or listening, and was struck by a train and killed, an action to recover damages cannot be maintained. MITCHELL, J., said: "The law requires a full stop, not only for the sake of time and opportunity for observation, but to secure undivided attention, and the substantial and not merely perfunctory performance of the duty to look and listen."

In Hoelzel *v.* Crescent City R. R. Co. (La.), 3 Am. Neg. Rep. 409, it was held that the rule that one, before attempting to cross the track, should "stop, look and listen," applies to a street railway moved by electricity.

In Texas, the rule seems to have been unmistakably laid down by the Supreme Court that failure to stop, look, and listen is not negligence *per se.* See Railway Co. *v.* Bush (Tex.), 34 S. W. Rep. 133; Railway Co. *v.* Shieder, 88 Tex. 152.

See also Elston *v.* Del., Lack. & W. R. R. Co., 196 Pa. St. 595, 8 Am. Neg. Rep. 345; Muckinhaupt *v.* Erie R. R. Co., 196 Pa. St. 380, 8 Am. Neg. Rep. 349.

Question for jury.

In Atchison, Topeka & Santa Fe R'y Co. *v.* Willey (Kan.), 6 Am. Neg. Rep. 515, it was held that when a traveler on a country highway comes to a railway crossing with which he is familiar, knowing that a train is about due at that point and liable to pass at any time, it becomes his duty, as an act of ordinary prudence, to look and listen for its approach; and if the sense of sight is unavailing, because of obstructions to the view, and the sense of hearing unavailing, because of preventing noises, it becomes his duty, as a further act of ordinary prudence, to stop, in order to better enable him to look and listen before entering upon the crossing; and in such case, if by stopping he can see or hear the approaching train, but fails to do so, his negligence in such respect should be declared as matter of law, and not left to the determination of the jury as a question of fact.

In Lewis *v.* Long Island R. R. Co., 162 N. Y. 52, 7 Am. Neg. Rep. 299, tally-ho accident at railroad crossing, it was held that while a person approaching a railroad crossing is not required as a matter of law to stop before attempting to cross, his omission to do so is a fact for jury to consider.

It was held in Stackus *v.* Railroad Co., 79 N. Y. 464, that the traveler need not, as matter of law, stop his team, or rise up in his wagon or get out; that he must look both ways and listen for the approach of the train; that whether he ought to do either or all of these things, in order to relieve himself from the charge of negligence, is for the jury to decide.

See also the following cases: Mackrall *v.* Omaha *v.* St. L. R. Co. (Iowa), 8 Am. Neg. Rep. 346; Penn. R. R. Co. *v.* Pfuelb (N. J.), 3 Am. Neg. Rep. 433.

When rule does not apply.

In Wosika *v.* St. Paul City R'y Co., and Shindelus *v.* Same (Minn.), 8 Am. Neg. Rep. 72, it was held that a mere passenger in a vehicle, who had no control over the team, was not guilty of negligence in failing to look out for cars when crossing the track.

But see ILLINOIS CENTRAL R. R. Co. *v.* MCLEOD *(Mississippi, January, 1901)*, 29 So. Rep. 76, action for killing plaintiff's intestate at railroad crossing, where

it appeared that McLeod hired a vehicle, with a driver, and on returning from a drive had to cross defendant's track, they having driven through a lane made by a wire fence between them and the railroad right of way. "In order to cross the railroad track from this lane, they had to make a turn from the lane of some abruptness around the corner of the wire fence which ran along the railroad right of way, and which corner was fifty feet from the center of the railroad track. Up to the place of the turn, they were driving north in the face of a stiff breeze coming from the north. At the same time there was a freight train going north, unknown to them. The engineer saw them as they were driving near the turn, but sounded no alarm for that crossing, for the reason, as he says, that he feared it might frighten their horses. Be this as it may, the occupants of the open vehicle, when they got to the turn, looked back, and saw no train, but, without stopping and listening, drove around the curve of the right of way wire fence and up to near the track, when they found the engine of the north-bound freight train right at them, when the engineer blew two sharp whistles. They had stopped suddenly, but too late, and the horses wheeled, threw Mr. McLeod out on the ground, causing injuries of which he soon after died. This puts the case absolutely as strong for the plaintiffs below as it can be put, and the evidence of the whiskey drunk by the deceased and the driver on that drive, and of their conversation in the lane about the quality of the land in the field as they passed, is left out of view altogether. Mr. McLeod gave the driver no directions at all, and in no way interfered with his management of the team. From the facts so put, it is too plain for controversy that, if the driver had been the party killed, no court would have permitted recovery. Recognizing this palpably clear proposition, the effort of appellees is to put Mr. McLeod in a different category, on the theory that the driver's negligence cannot be imputed to him, since he was merely the hirer of the driver, the vehicle, and the team. But this doctrine cannot be stretched to save a case like this. It is a mistake to suppose that a passenger in an open buggy need not exercise the commonest prudence, the most ordinary care, when the danger of his surroundings is apparent. Ordinary and natural prudence requires him to take some action, and to check or remonstrate with the driver. * * * In Railroad Co. *v.* Davis, 69 Miss. 444, this principle is recognized, and the appellee there saved her case by the proof that she tried to stop the driver. One crossing a railroad, who can see, must see at his peril. Murdock *v.* Railroad Co., 77 Miss. 487; Jobe *v.* Railroad Co., 71 Miss. 734; Winterton *v.* Railroad Co., 73 Miss. 831. In such cases the negligence of the railroad company in not sounding an alarm for the crossing cannot avail to condone the lack of ordinary care by the party injured. On plain principles, the verdict below was unwarranted, and the motion for new trial should have been sustained. Notwithstanding our deep sympathy with the sufferers from the calamity, the case must be reversed and remanded." Opinion by CALHOON, J.

See also O'Toole *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 99, holding that a passenger in a street car approaching a railroad crossing is not bound to look or listen for an approaching train.

McCANN v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

United States Circuit Court of Appeals, Seventh Circuit, January, 1901.

WORKMAN INJURED WHILE WAITING BETWEEN TRACKS AT CROSSING TO BOARD TRAIN — CONTRIBUTORY NEGLIGENCE. — In an action to recover damages for personal injuries sustained by being struck by a train at a crossing, it appeared that plaintiff was standing between two tracks at a crossing waiting to board a train of another company, which tracks were seven feet apart, so that when two trains pass upon adjoining tracks the space between the passenger coaches is only about eighteen or twenty inches, too narrow for safety for a person standing between the tracks. The situation and operation of the trains at this crossing were well known to plaintiff, and the evidence showed that he was warned by other workmen, who were waiting to board the train with plaintiff, to cross back over the tracks, but he paid no attention, and crossed over the tracks remaining between them until the trains came. *Held*, that plaintiff was guilty of contributory negligence, and that it was not error to direct verdict for defendant (1).

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Action by Marquis H. McCann against the Chicago, Milwaukee and St. Paul Railway Company. The case was taken from the jury, and a verdict directed for defendant, and plaintiff brings error. *Affirmed.*

"This action is for a personal injury sustained by the plaintiff in error (plaintiff below), caused by being struck by a train of cars while standing at a crossing on Leavitt street, in the city of Chicago, waiting to board a train on the Pittsburg, Cincinnati, Chicago and St. Louis Railroad on December 13, 1897, by means of which he was thrown to the ground, and his leg crushed by being passed over by the engine of the said train. Leavitt street runs north and south, and at the place where the accident happened it is crossed at right angles with several railroad tracks running east and west. The two most northerly of these tracks are the main tracks of the Galena Division of the Chicago and Northwestern Railway Company. Immediately south of these, and adjoining, are two other

1. See also two preceding cases reported, relating to Accidents at Crossings.

For other Crossing Accidents, from 1897 to date, see vols. 1–9 Am. Neg. Rep., and the current numbers of that series of Reports.

main tracks of the first above named road known as the "Pan Handle," but used also by the defendant company. The north track is used for out or west-bound trains, and the south track for east-bound trains. Just north of these tracks lie two main tracks of the Chicago and Northwestern Railway Company, and just south extend the switch tracks of the Pan Handle road. These joint tracks are seven feet apart, so that when two trains are passing upon adjoining tracks the space between the passenger coaches is only about eighteen or twenty inches, — too narrow for safety for a person standing between the tracks; and it is evident it was never intended that a person should so stand. These tracks, besides being fenced, had crossing gates maintained on either side, and a flagman stationed there to give warning; so that for a grade crossing it was made as safe as could well be, and as safe as other like grade crossings in the city. For two years prior to this accident the Pan Handle company had run a work train west over the north joint track above referred to, in the early evening, in order to carry its own employees to and from their places of work along the line of its road. This train did not carry passengers generally, but only employees of the road starting from their round house at Curtis street, and running to the Englewood yards at Sixty-third street. It carried no passengers, and was not put in for that purpose. It ran on a schedule as No. 42 of the time-card issued by the superintendent of terminals controlling the operation of the joint tracks between the Union Depot and Western avenue in the city. It was not scheduled to stop at Leavitt street, but had been accustomed to do so every evening to accommodate the workmen of that road residing near the crossing. There was no depot there, nor any platform, but simply an ordinary street crossing, planked as such like those over the other highways in the city. The joint time-table shows that no train was scheduled to stop at this crossing, and none did so in fact except this work train, which had been accustomed to stop to pick up the employees of that road who wished to go west to their work. About the same time in the evening the defendant's Pioneer Limited train of empty sleepers, coaches, and baggage cars was regularly backed east upon the adjoining track to the Union Depot to go out on its run to St. Paul. It was scheduled upon the joint time-card as coach train No. 1, and its time was fifteen minutes from Western avenue to the Union depot a distance of three miles. These two trains — one on the Pan Handle the other on the defendant's road — usually met as they did on this evening at or near Leavitt street. The plaintiff was a flagman at Fifty-ninth street for the Pan Handle company. He lived northwest from the place of

the accident, and for fifteen months had been accustomed to take this work train at Leavitt street to go to and from his work. On the evening of the accident he reached this crossing about ten minutes before train time. His relation of the accident is this: "On this night I turned south on Leavitt street. Was waiting at the railroad tracks with the rest of the men to take the work train out to Fifty-ninth street. Waited at crossing about ten minutes. The train was about on time, and due there at 5:40. I was waiting on the north side of the joint main tracks. When I saw it, I think the work train was about eighty feet east of the east sidewalk on Leavitt street, but slowed up when she saw I was between the two tracks, — just as she got about to the east sidewalk. In the meantime I went across, so as to get on the south side of the car as she pulled over the crossing, to save the rush, because she only stopped a minute there to let us on, and I thought I would have a better chance to get on, being an old man, about fifty-nine years, at the time of the accident. After I stepped over there, I waited, and saw both trains were approaching pretty close on to me. After I crossed over to the south, I stopped between the two tracks as near the middle of the crossing as could be. I saw the St. Paul train backing up when she was about forty feet from me. Seeing the other train coming up, I tried to gauge myself as near as I could in the center of the two tracks, so as not to get hurt. I saw the St. Paul train was coming pretty fast. The Pan Handle engine was about the same distance east from me. As the first Milwaukee coach passed me, I turned around to see if I could catch hold of the hand rail of that car. I found she was going too fast for me, and I could not catch it. I wanted to catch hold of the rail of the St. Paul coach in order to get to the rear end of the work train ot avoid getting hurt by either one of them. I saw she was going too fast, and I could not do it. Then I turned around, and, just as I turned, it struck me in the shoulder. I faced right north, fell over against the Pan Handle engine, and struck my head against it. The second coach of the St. Paul struck me on the left shoulder, and knocked me over against the Pan Handle engine. I knew just what was up at the time. Of course, I was knocked senseless, but regained consciousness when I found the driving wheel was on my foot. They took me out and to the county hospital, where they cut off my leg about eight inches below the knee. I used to go there every night and take that train for about fifteen months. There were only twelve or thirteen workmen there that night. There was only one car in the work train. The speed of the St. Paul train was about twenty miles an hour. To the best of my judgment at

the time, it was impossible for me to get across the track the St. Paul train was on after I saw the train. I was in the middle of the two main tracks." On cross-examination he says: "I did not pay any attention to know whether the workmen standing there were yelling to me or to some one else. I had come to this crossing and had taken this work train there every night for fifteen months before the accident. I got there that night about ten minutes before the train came. I stood on the north side of the Pan Handle tracks. There were some other workmen who were standing on the same side with me, to take the train. I noticed the Pan Handle work train coming from the east, and thought I would go over to the south side of the car as she pulled up to the crossing, so as to have more room to get on the train when it did stop there. I went over to the south side, between the two joint tracks, for that purpose. I did not remain on the side where the rest of the workmen got on. I went over to the south side alone. When I went over to the south side, the Pan Handle engine was just east of the east sidewalk on Leavitt street and the St. Paul train was close to the crossing on the west side of it. They were about equal distances apart when I crossed over to the south side. I think, if anything, the St. Paul was nearer. Before I crossed over, I did not look to the east nor to the west. After I had got over, and between the tracks, then I looked, and saw both trains coming. The gates were down at that time. When I got between the tracks I was alone in there, and all the other workmen were on the other side. Could not swear whether there were lights on the rear end of the Milwaukee coaches, because I did not notice them. The east end of the Milwaukee coaches reached me first, because the Pan Handle train slowed up so. The second coach is where it caught me. The Milwaukee coach got to me before the Pan Handle engine did. The second coach hit me. I think it was the side of the coach that hit me. The Milwaukee train never stopped. I do not know whether I touched the handle of the coach or not. I either turned around or whirled around in such a way that my left shoulder was struck. I have been quite deaf about twenty years. The trains met where they usually did." At the close of the testimony, on motion of defendant's counsel, the court took the case from the jury, and directed a verdict in favor of the defendant, on the ground that the evidence on the part of the plaintiff showed contributory negligence on his part. It is to reverse that direction of the court below that this writ of error is brought."

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

FRANK B. GROVER, for plaintiff in error.

CHARLES B KEELER, for defendant in error.

BUNN, District Judge (on the foregoing statement of facts), delivered the opinion of the court, as follows:

The facts are mainly conceded. The case rests upon the plaintiff's testimony as given in the statement of facts. There is a material conflict in the testimony as to which coach struck the plaintiff; three witnesses on the part of the defendant testifying that he was not struck by a coach of the defendant's train, but was struck by a coach of the Pan Handle train. But that is quite immaterial according to the view we have taken of the case. We think, upon the plaintiff's own statement of his case, the direction of the court was right, and fully supported by the evidence. Indeed, we think the court might have made the grounds of its decision still broader, and held: First, that the negligence of the plaintiff was the proximate cause of the injury, and, second, that the testimony showed no negligence or want of proper foresight and caution on the part of the defendant company or any of its officers or employees. The situation and the running and operating of these trains at this crossing were well known to the plaintiff. From his own statement he knew all about them. He had taken the same Pan Handle train every day for fifteen months. He knew the trains were expected to meet at that time and place, and that there was no safe standing room between the tracks. He went deliberately into a place of imminent danger, without so much as looking to the east or west to see if the trains were coming, and remained there until the trains came, knowing well that there was not safe standing room between the tracks. The evidence shows that he was warned by other workmen to cross back over the tracks, but that he paid no attention to the warning. Knowing the situation as he did, it was negligence to cross over the tracks and remain between them until the trains came. It was, no doubt, possible, after he saw the trains coming, by the exercise of good judgment in an emergency, to have escaped the peril, either by standing still flatwise upon the eighteen or twenty inches space that he had between the tracks, and making no effort to get hold of the handles upon the coaches of the Milwaukee train; or, what would perhaps have been better still, to have thrown himself flat on the ground lengthwise between the tracks and allowed the trains to pass over him. Still he might be excusable for not exercising the best judgment in such an emergency when the peril was full upon him. But he was not excusable for voluntarily putting himself in and remaining in a position of such imminent danger without any sufficient reason. And

no doubt the jumping to catch hold of the handle of the car while under motion was itself a danger and a peril in the circumstances. He was not a passenger on the defendant's road, and as a passenger that company owed him no duty. Indeed, he was not a passenger upon the Pan Handle road, though that question is not material here, but was, while going upon its train to and from his work on the line of that road, its workman and employee. Elwald *v.* Railway Co., 70 Wis. 420, 36 N. W. Rep. 12, 591. He knew the speed of the defendant's trains at that point, and that it did not stop at Leavitt street crossing. That company did not owe him the usual duty owing to a passenger upon its road. It was, no doubt, under obligation to do all it could to prevent injury after its officers and employees in charge of the train were cognizant of the plaintiff's peril. But there is no evidence that this was not done. The defendant had no station or stopping place at that point. The ordinance of the city allowed trains a speed of twenty miles an hour. There is no evidence tending to show that the defendant's train was running at a higher rate of speed. On the contrary, the evidence shows the train to have been going at from twelve to sixteen miles an hour.

There are several grounds of negligence alleged but the one mainly relied upon was the speed of the defendant's train. But there is no evidence of negligence in this respect or in any other respect. Another ground of negligence alleged was the lack of train lights but no case is made under this head the evidence without conflict showing that the rear or east end of the backing train was furnished with a large bulls-eye reflector ten to twelve inches in diameter, throwing a continuous red light, and placed at the outer edge of the platform in the center of the vestibule. By it stood a white hand lamp, and on each side of the coach, at the end, hung a small red lamp or "marker." All these lights were burning that evening, and were plainly seen 150 to 200 feet from the crossing by several witnesses, and also by the engineer and fireman of the Pan Handle train two blocks away from them. But the lights were of no use to the plaintiff, as he says he did not look to the east nor to the west. If he had said he was fifty-nine years old, and did not greatly care longer to live, his words would have corresponded fairly well with his actions in going into such a place of peril without so much as looking in any direction for danger, and remaining after he saw the peril was upon him. If he could not hear, he was under all the more obligation to use the senses he had. In any case it was his duty to have looked all ways for danger.

Chicago, R. I. & Pac. R'y Co. *v.* Houston, 95 U. S. 697 (1); Schofield *v.* Railway Co., 114 U. S. 615, 5 Sup. Ct. Rep. 1125; Railroad Co. *v.* Freeman, 174 U. S. 379, 19 Sup. Ct. Rep. 763; Walker *v.* Kinnare, 22 C. C. A. 75, 76 Fed. Rep. 101; Blount *v.* Railway Co., 9 C. C. A. 526, 61 Fed. Rep. 375; Stowell *v.* Railroad Co., 39 C. C. A. 145, 98 Fed. Rep. 520; Neininger *v.* Cowan, 42 C. C. A. 20, 101 Fed. Rep. 787; Gilbert *v.* Railroad Co., 97 Fed. Rep. 747, 38 C. C. A. 408; Railroad Co. *v.* Peebles, 14 C. C. A. 555, 67 Fed. Rep. 591; Pyle *v.* Clark (C. C.) 75 Fed. Rep. 644. If precedents were needed upon so plain a proposition, all of the above cases are authority in point for the action of the court below in directing a verdict in favor of the defendant on the ground of contributory negligence. Knowing the situation as the plaintiff did, it was negligence *per se* to stand between the tracks while the trains passed. Beach, Contrib. Neg. (3d ed.) sec. 216; Moore *v.* Railroad Co., 108 Pa. St. 349; McGeehan *v.* Railroad Co., 149 Pa. St. 188, 24 Atl. Rep. 205; McClary *v.* Railroad Co. (C. C.) 46 Fed. Rep. 343; Bjork *v.* Railroad Co., 85 Ill. App. 269; Cunningham *v.* Railroad Co. (C. C.) 17 Fed. Rep. 886. As was said by the Supreme Court, speaking through Mr. Justice Miller, in Ellicott *v.* Railway Co., 150 U. S. 245, 14 Sup. Ct. Rep. 85: "But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employees on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom."

In the case at bar the plaintiff not only went upon the track without looking, but he remained there for ten minutes waiting for trains that he expected and had every reason to believe would come, and this while he could have remained with the other workmen on the other side of the tracks in perfect safety. It is not necessary to multiply authority upon the question.

Upon the question of the negligence of the defendant company there was nothing upon which a verdict could have been based. Each and all the grounds relied upon failed in the proof. The crossing was properly guarded, and the crossing gates down. The speed of the train was not excessive or unlawful. The train was properly lighted. The engine had an automatic bell ringer, which was always ringing when the engine was in motion, and was ringing

1. Chicago, R. I. & Pac. R'y Co. *v.* Houston, 95 U. S. 697, is repeated in 7 Am. Neg. Cas. 345.

that night on the occasion in question, and the gateman's bell was ringing constantly, the flagman upon the crossing calling out a verbal warning when the train was approaching and while it was 200 feet away, with the plaintiff standing only ten feet from him. In addition to these things, an air whistle or "tail hose" whistle on the rear end of the backing train was sounded, and it was not the company's fault that the plaintiff could not hear. It is quite evident, however, from his own testimony that it would have made no difference if he had heard it, as his deliberate purpose was to get away from the crowd, and to board the train on the south side, from between the tracks. Indeed, it is difficult to see what the defendant company could have done that was not done to prevent such an accident (1).

The judgment of the Circuit Court is affirmed.

1. *Person killed by train while walking along track to board train — Contributory negligence.* — In ST. LOUIS AND SAN FRANCISCO R'y CO. *v.* WHITTLE *(United States Circuit Court of Appeals, Eighth Circuit, 1896)*, 7 Am. Neg. Cas. 492, 74 Fed. Rep. 296, it was held that where a person went along a track, in the darkness, for the purpose of boarding a train which had gone some distance beyond the station, but the train backing, the passenger was run over and killed, it was error to instruct the jury that if defendant's employees on the train could, by the exercise of reasonable care, have avoided killing the deceased, notwithstanding his negligence, then the negligence of deceased of itself would not preclude plaintiff's recovery, as there was no evidence tending to show that any of defendant's employees had any knowledge that deceased was on the track. In such case it was also held that, upon the facts, it was error to refuse to charge that deceased was guilty of contributory negligence, and there could be no recovery. Judgment of the United States Circuit Court for the Western District of Arkansas in favor of plaintiff reversed.

SOUTHERN RAILWAY COMPANY v. LYNN.

Supreme Court, Alabama, January, 1901.

PASSENGER EJECTED FROM TRAIN — PLEADING — DEFENSE — EVIDENCE — INSTRUCTION. — In an action to recover damages for being ejected from defendant's train, defendant filed two pleas, the first being the general issue and the second a special plea setting up independent matter. The allegations of the complaint, except as to the rude manner of the ejection, were sustained by uncontradicted evidence, but there was a conflict as to the matter set up in the second plea, which was that plaintiff was ejected on account of improper behavior and boisterous conduct on the train. Plaintiff, in order to reach his destination, was obliged to change cars, and there was evidence that he had paid his fare. *Held*, that the question as to the duty of plaintiff after having paid his fare to the conductor on the main line, to obtain a check or other evidence of payment from such conductor was foreign to the issues presented under the pleadings, and evidence as to such matter was irrelevant, as such matter to be available as a defense should have been presented under a proper plea; and written charges requested by the defendant predicated upon the theory that it was plaintiff's duty to hold such check or other evidence of payment of fare, were properly refused (1).

WALKING ON TRACK AFTER BEING EJECTED FROM TRAIN — TRESPASSER — INSTRUCTION. — In such action where the evidence showed that after plaintiff was ejected from defendant's train he could not get to his destination without wading a creek, except by walking along defendant's track, the fact that plaintiff was traveling on defendant's track did not make him a trespasser, and an instruction which assumed that plaintiff was a trespasser was properly refused.

APPEAL from City Court of Birmingham.

Action by Archie Lynn against the Southern Railway Company to recover for the unlawful ejection of plaintiff as a passenger. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

The complaint, as originally filed, contained two counts, demurrers to which were overruled. The third count of the complaint, which was added by amendment, averred that the defendant was operating a railroad as a common carrier, and then averred that on October 1, 1898, the defendant contracted, for hire, to safely convey the plaintiff on its cars from the town of Brookside, a station on its

1. For actions relating to Ejection of Passengers from Trains, etc., from the earliest period to 1897, see vol. 8, Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic to date are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

road, to Blossburg, a station on defendant's branch road, running from Cardiff Tunnel, or Fishtrap Tunnel (the station where the branch road connected with the main line), to Blossburg; that the plaintiff paid his fare from Brookside to Blossburg, and was conveyed by defendant from Brookside to Fishtrap Tunnel, or Cardiff Tunnel, where it became necessary for him to change cars to another of defendant's trains, running from Cardiff Tunnel to Blossburg. The third count of the complaint then averred as follows: "And after plaintiff had so transferred and gotten upon the said last-named train, and had proceeded on towards Blossburg some distance, to wit, 150 yards, the conductor demanded of plaintiff to pay his fare, whereupon plaintiff informed said conductor that he had paid his fare to the conductor on the main line, from Brookside to Blossburg, and had a right to be carried to Blossburg without further pay; but the defendant, not regarding its promise and undertaking to carry plaintiff to Blossburg, to which point he had already paid his fare, demanded further payment of plaintiff, in a harsh, offensive, and insolent manner, and, upon plaintiff's refusal to make such payment, required plaintiff to leave said car, by reason whereof he was compelled to walk a long distance, to wit, a mile and a half, over a rough road and over a high trestle, and upon a warm and sultry day, to get to Blossburg, and he was put to inconvenience and discomfort in walking over said road, and was subjected to anxiety and solicitude in walking over said trestle, and he was greatly humiliated in his feelings, and hurt in his pride, by being thus exposed to the other passengers on the car as a person who was trying to beat his way on the train, to his damage $500 as aforesaid, wherefore he brings this suit." Demurrers were interposed to the complaint as amended on the ground that the averments in each of said counts were indefinite and uncertain, and do not show that the plaintiff was made to leave the defendant's car because of the fact that he refused to pay his fare. These demurrers were overruled. The defendant pleaded the general issue and the following special plea: "2. For further plea the defendant says that on the occasion mentioned in said complaint the plaintiff, with others, to wit, David Lynn and Archie Pollock, boarded the train of the defendant at Cardiff Tunnel to go to Blossburg, and that after they had so boarded said train they were disorderly or boisterous thereon, and on account of their disorderly conduct they were ejected from said train by the conductor, and among those ejected for said reason was the plaintiff in this cause, wherefore defendant says that it is not liable in this action in damages to the plaintiff." As stated in the opinion, every material averment of the complaint, except the one as to the

rude manner in which the plaintiff was ejected from the cars, was sustained by the uncontroverted evidence in the case. There was evidence for the plaintiff tending to show that one Luster was the conductor on the train of the defendant running on its main line the day in question, when the plaintiff was a passenger thereon; that the plaintiff boarded the train at Brookside and paid his fare to Blossburg; that when the train passed Fishtrap Tunnel, or Cardiff Tunnel, as it is sometimes called, the plaintiff, together with several companions, got off of the train; that, as the plaintff and his companions and the other passengers got off the train at Cardiff Tunnel, the witness stated to Mr. Carr, who was the conductor on the branch road that, some of them had tickets, and some of them had checks, and some had nothing, meaning thereby that all had paid the fare, but that he did not know whether the conductor on the branch road heard or understood what he said. This witness further testified that when the plaintiff paid him his fare he did not give him a check or ticket. R. F. Carr, who was examined as a witness for the defendant, testified that he was the conductor on the branch road running from Cardiff Tunnel, or Fishtrap Tunnel, to Blossburg, on the day the plaintiff was put off the train, and that he did not hear the conductor on the train on the main line say that the plaintiff had paid his fare. During the examination of the witness Carr, he was asked the following question: "If the two Lynn boys and Pollock [who were on the train on the day in question] made an attack on you shortly after that?" The plaintiff's counsel objected to this question, the court sustained the objection, and the defendant duly excepted. During the examination of David Lynn as a witness for the plaintiff, he testified that he was a brother of the plaintiff, and further testified that the plaintiff paid his fare from Brookside to Blossburg, and that the conductor gave him no ticket or check. Thereupon the plaintiff's counsel asked the witness the following question: "State to the jury whether it is customary for the conductor on the main line to receive the fare from Brookside to Blossburg without furnishing any check to the passenger." The defendant objected to this question on the ground that it was illegal, irrelevant, and immaterial, the court overruled the objection, and the defendant duly excepted. This witness, further testifying, described the place he boarded the train on the branch road after getting off the train on the main line. He was then asked by the plaintiff to state whether or not passengers frequently got on where he got on. The defendant objected to this question, and duly excepted to the court's overruling its objection. The other facts of the case necessary to an understanding of the

decision on the present appeal are sufficiently stated in the opinion. The defendant separately excepted to several different parts of the court's oral charge to the jury, but it is unnecessary to set these charges out *in extenso*. The defendant requested the court to give to the jury several charges having reference to the plaintiff's duty to have required a check or other evidence of payment of fare by him of the conductor on the main line, and duly excepted to the court's refusal to give each of such charges as asked. The defendant also requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as requested: "6. Exemplary or punitive damages cannot be recovered in this case. 7. No damages can be recovered by reason of plaintiff's walking to his destination along and over the track and trestle of defendant's railroad; such act being purely voluntary, and being, further, an act of trespass on defendant's property." "10. The court charges the jury that if they believe from the evidence that the only fault or negligence in the case is the fault or negligence of Conductor Luster in not giving plaintiff a check or other evidence of the payment of fare, or in not properly notifying Carr of such payment, your verdict should be for the defendant. 11. If you believe from the evidence that Conductor Luster alone was negligent in not doing what was reasonably necessary to inform Conductor Carr that plaintiff had paid his fare, your verdict should be for the defendant." "14. You cannot find a verdict for the plaintiff by reason of anything that Conductor Luster did or failed to do. 15. The jury may, in their sound judgment, and guided by the evidence in this case, if they should conclude to find for the plaintiff, assess only nominal damages, such as one cent or one dollar." There was verdict and judgment assessing plaintiff's damages at $100. From this judgment the defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

SMITH & WEATHERLY, for appellant.

LANE & WHITE, for appellee.

DOWDELL, J. — The complaint contained three counts, to which the defendant filed two pleas; the first being the plea of not guilty, which was a denial of the material allegations of the complaint. Code, sec. 3295. The second was a special plea setting up independent matter in avoidance of plaintiff's right of recovery. Every material allegation of the complaint, except the averment as to the rude manner in which the plaintiff was ejected from the cars, was sustained by the uncontradicted evidence in the case. The testimony was in conflict as to the matter set up in the second plea,

which was that the plaintiff was ejected on account of improper behavior and boisterous conduct on the train. The question as to the duty of plaintiff, after having paid his fare from Brookside to Blossburg to the conductor on the main line of the defendant's railroad, to obtain a check or other evidence of such payment from such conductor, was foreign to the issues presented under the pleadings as made up by the parties. It was plainly the duty of the defendant, after having received the plaintiff's fare for transportation from the station of Brookside, where he boarded the defendant's train, to Blossburg, the destination of his journey, to have transported him safely to such destination without requiring additional compensation. If, by reason of a change of cars at Cardiff from the defendant's main line to a branch line of said defendant running to Blossburg, the rules and regulations of the defendant company required passengers making such changes, in cases where the fare had been paid from a point on the main line to a point on the branch line to the main-line conductor, to hold checks or other evidence of such payment of fare to the main-line conductor to be presented to the conductor of the branch line, then, such matter, to be available as a defense, should have been presented under a proper plea. This was not done in the present case, and therefore such matter was irrelevant under the pleadings. Written charges requested by the defendant predicated upon the theory that it was the plaintiff's duty to hold such written check, or other evidence of payment of fare by him to the conductor on the main line, were properly refused.

There was evidence tending to show that the plaintiff could not reach his destination (Blossburg) on foot without having to wade a creek, except by traveling over defendant's track. Certainly, under these circumstances, after having been wrongfully ejected from the train, and by the defendant put down upon its track, he could not be held a trespasser. Written charge No. 7 requested by the defendant, which assumed that the plaintiff was a trespasser, was properly refused. Charge No. 15 was misleading in its tendencies, and no error resulted in its refusal by the court.

Certain portions of the oral charge of the court were excepted to by the defendant, but when taken in connection with other portions, and considered as a whole, we think the charge is free from reversible error. The court might have properly omitted in its instructions to the jury any reference to the corresponding duties of the passenger and the defendant company upon the subject of checks or other evidence of payment of fare to the first conductor, since this was not within the issues under the pleadings, though discussed

by counsel on both sides. The bill of exceptions does not show any written charge given by the court at the request of the plaintiff. There is, however, such a charge copied into the transcript, but charges given or refused will not be reviewed by this court unless presented by the bill of exceptions.

It was a conceded fact (at least, not disputed), that the plaintiff paid his fare to the main-line conductor from Brookside to Blossburg. Consequently the admission of the testimony by the witness David Lynn as to the custom of the main-line conductor in receiving fare from passengers from Brookside to Blossburg, if error, was error without injury, since, under the pleadings, the issue on this point was one only of payment of fare *vel non*. For like reason, we think no injury resulted from the ruling of the court in admitting the testimony of this witness to the effect that it was customary for passengers to get on the train at Fishtrap Tunnel, where he got on. Besides, this was in rebuttal of irrelevant evidence on behalf of the defense.

On the issue presented by defendant's plea No. 2, we think the boisterous conduct of the other persons than the plaintiff, or subsequent difficulties between the conductor of the branch line and the plaintiff, were wholly irrelevant and immaterial, and the court committed no error in not permitting this to be shown in evidence.

The complaint, as amended, sufficiently stated a good cause of action. The judgment of the city court is affirmed.

INABNETT v. ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Supreme Court, Arkansas, March, 1901.

NOISE OF WHISTLE AND ESCAPING STEAM FROM TRAIN AT RAILROAD CROSSING — HORSE FRIGHTENED — PERSON DRIVING INJURED WHILE TRYING TO AVOID DANGER — INSTRUCTIONS. — In an action to recover damages for personal injuries sustained by plaintiff trying to extricate himself from a dangerous situation caused by his horse being frightened by the noise of the whistle and escape of steam as defendant's train was passing a crossing which plaintiff was approaching, it was error to instruct that negligence was not to be imputed to defendant merely from the blowing of a whistle or emission of steam from engine, even though the same may frighten horses, unless there were circumstances in

the knowledge of defendant's engineer at the time which admonished him that injury would result if such acts were done by him (1).

TRAVELERS APPROACHING RAILROAD CROSSING — DUTY OF RAILROAD — INSTRUCTION. — In such action it was also held error to instruct that "defendant's servants and engineers were not bound to take notice of the mere presence of plaintiff and his horse in close proximity to the railway," such instruction being calculated to mislead, as the duty of railroads is to exercise reasonable and ordinary care to observe travelers about to cross the railroad upon the highway.

APPEAL from Circuit Court, Nevada County.

Action by J A. Inabnett against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. *Judgment reversed.*

L. A. BYRNE, for appellant.

DODGE & JOHNSON, for appellee.

WOOD, J. — This suit was brought by Inabnett to recover damages for personal injuries alleged to have been caused by the negligence of the railway company in blowing the whistle and in allowing steam to escape from the steam cocks of its engine while plaintiff,

1. For other actions relating to Horses Frightened by Noises of Steam, Whistle, Trains, etc., from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

Horse frightened by steam from engine — Receiver not liable where cars were operated by another company. — In THOMPSON *v.* DOTTERER, Receiver of NEW ORLEANS & WESTERN R'Y CO. *(Louisiana, February, 1901)*, 29 So. Rep. 483, judgment for plaintiff was reversed, the court holding that "a receiver of a railway company which furnishes cars to another company under a traffic arrangement whereby the latter company is to operate them is not liable for damages resulting from such operation over the tracks of the latter company." The facts (as stated by MONROE, J.), were as follows: "Plaintiff was holding, by their heads, a pair of horses which were standing on Basin street, in New Orleans, upon August 4, 1899, when a steam engine, with cars attached, coming along Bienville street, turned the corner into Basin, and so frightened the horses that the plaintiff, in the effort to control them, was seriously injured. He brings this suit for the recovery of $2,500, as the damages sustained, against William C. Dotterer, receiver of the New Orleans & Western Railway Company, alleging that the train which caused said damages was unlawfully and negligently operated by said receiver. The answer is a general denial. There was a verdict and judgment for the plaintiff in the sum of $250, from which the defendant has appealed, and to the appeal the plaintiff has answered, praying an increase in the judgment. The theory upon which the suit was brought and upon which it has been argued on behalf of the plaintiff is that the horses which the plaintiff was holding were standing upon Basin street, at a point about forty feet from the corner of Bienville, and with their heads in the direction of the latter street, when the engine and cars came sharply around the corner from Bienville street, and were suddenly brought into such close

in his buggy, upon the highway, was approaching the public crossing in the city of Texarkana. It is alleged that the unnecessary blowing of the whistle greatly frightened plaintiff's horse, and that, while he was endeavoring to calm same, plaintiff observed an engineer on the engine nearest to him, and saw that the engineer was apprised of plaintiff's danger, but, without regard to plaintiff's safety, the engineer in a grossly careless manner opened the steam cocks of his engine, and began to move the same, which caused the plaintiff's horse to take greater affright, and caused him to suddenly turn from the highway, and to spring down a deep embankment, whereby plaintiff, in an attempt to extricate himself from the danger of the situation, was thrown from the buggy, and seriously hurt, etc. The answer denies all material allegations, and sets up contributory negligence. Without giving the evidence in detail, it is sufficient for the purpose of this opinion to state that there was proof on the part of the plaintiff which tended to support the allegations of his complaint. The jury might have found from plaintiff's testimony that the agents of the defendant knew, or could have known by the exercise of ordinary care and prudence, that the blowing

proximity to the horses that the discharged steam went under them, and, with the ringing of the bell and other noises, frightened the horses, with the result as stated. A careful consideration of the testimony of the two witnesses who undertook to establish these facts leaves us in considerable doubt concerning them. The plaintiff himself swears that he was standing with the horses at the corner of Basin and Canal streets, which is two squares distant from Basin and Bienville, and we find nothing in his testimony which is irreconcilable with that statement. Upon the other hand, a witness named Hardy places the horses, of which he was the owner, and the plaintiff, where they are placed by the petition, so that there is a conflict upon that important point between the two witnesses who alone testify concerning it. We need not, however, be detained by the consideration of that question. It is shown by affirmative and uncontradicted evidence that William C. Dotterer, receiver of the New Orleans & Western Railway Company, was not operating the train which is said to have caused the accident, but that said train was operated by the New Orleans, Spanish Fort & Lake Railroad Company, and that the tracks near which the accident occurred, and over which said train was being operated at that time, were tracks claimed by and in the use of said New Orleans, Spanish Fort & Lake Railroad Company. Whether that company was properly making use of the corporate and other franchises is a question which does not properly come up in this case. As a matter of fact, it was acting as a corporation, and in that capacity had made a traffic arrangement whereby it was operating cars furnished by he New Orleans & Western Railway Company over tracks of which it (the Spanish Fort Company) claimed to be in possession as owner, and over which it is alleged in the petition the New Orleans & Western Railway Company had no right to operate cars."

of the whistle, and especially the escaping of steam from the steam cocks of the engine, under the circumstances detailed by the plaintiff, were well calculated to frighten plaintiff's horse, and to endanger plaintiff, and cause the injury of which he complains. There was evidence also to justify the verdict. Was the jury properly instructed? The court gave, on behalf of the defendant, the following, among other, instructions: "3. The jury are instructed that negligence is not to be imputed to the railway company merely from the blowing of a whistle, or causing steam to emit from an engine, even though the same may occasion fright to a horse or horses, unless the same was done under circumstances that made the act an imprudent and improper one upon that occasion; and the jury would have no right to impute negligence to an engineer under such circumstances, unless there were circumstances in his knowledge at the time admonishing him that injury would probably result if the act was done; and in this case, unless the jury find from the testimony that at the time of the accident in question there was nothing in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse, as seen by the engineer, which would have admonished him in time to have prevented it, or that giving of signals or permitting the steam to emit from his engine was likely to cause the horse to frighten, then he would not be guilty of negligence, even if you find such facts. 4. The court instructs the jury that mere proof that the train employees unnecessarily blowed the whistle or let off steam in close proximity to a team of horses does not necessarily establish negligence." "8. The court instructs the jury, in determining the question of the negligence of defendant's servants, they should take into consideration all of the facts and circumstances, that defendant's servants and engineers were not bound to take notice of the mere presence of plaintiff and his horse in close proximity to the railway, nor that that fact would raise a presumption that the horse would become frightened at the use of steam, but there must have been something at the time in the conduct and actions of the animal which indicated to the engineer that such results would probably follow before he could be charged with negligence." The third and eighth ignored the rule which enjoins upon railroads a high degree of care for the protection and safety of travelers upon the highway at and in proximity to public crossings in cities. It is their positive duty to keep a lookout for such travelers, and to use every reasonable precaution consistent with the proper operation and management of their trains to avoid injuring them. There might not be any circumstances, in the knowledge of the engineer, admonishing him that injury would

probably result from the unnecessary blowing of a whistle or escaping of steam. Yet such circumstances might exist, and the engineer's ignorance of them be on account of his wilful or negligent failure to do what the law requires; *i. e.*, to keep a lookout for them, and then to do whatever reasonable prudence would dictate to avoid injury to travelers. Hilz *v.* Railway Co., 101 Mo. 36, 13 S. W. Rep. 946; Frick *v.* Railroad Co., 8 Am. & Eng. R. Cas. 280; Weber *v.* Raiload Co., 58 N. Y. 451-462. Nor does the law gauge the standard of negligence by what the engineer in charge in any particular case did or knew. It is broader and more reasonable than that. Negligence is determined in cases of this kind by what any reasonably prudent and careful engineer would or should have known and done under the circumstances in proof. Both the third and eighth convey the idea that, unless there was something in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse "as seen by the engineer," which would have admonished him of plaintiff's danger, then he was not negligent in doing the acts complained of. This, too, regardless of whether he had exercised that prudence which any reasonably careful man would have exercised to become acquainted with the circumstances. In this respect the instructions were radically wrong, and wholly inconsistent with the instructions which the court had given at the instance of plaintiff, and which correctly stated the law. Railway Co. *v.* Lewis, 60 Ark. 409, 30 S. W. Rep. 765, 1135. Furthermore, the eighth instruction declares that the employees of the railroad "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway." This was well calculated to mislead. The duty of railroads is to exercise reasonable and ordinary care to observe travelers about to cross the railroad upon the highway. Here the travelers have a right to be, and they must be expected to be, constantly passing. They are "ever present," so to speak, and the railroad employees must exercise that diligence which the law requires to observe them. "The care and skill, to be reasonable," it is said, "must be proportioned to the danger and multiplied chances of injury." 3 Elliott, R. R. 1156, and authorities cited. It is generally for the jury to determine whether such care has been exercised. The fourth, to say the least of it, was not predicated upon the facts in evidence, and was, therefore, abstract, and should not have been given. Taken in connection with others, however, it may not have been prejudicial.

For the error in giving the third and eighth instructions for appellee the judgment is reversed, and the cause is remanded for a new trial.

TAUSSIG ET AL. V. BODE AND HASLETT.

Supreme Court, California, March, 1901.

LOSS BY LEAKAGE FROM BARRELS OF SPIRITS IN WAREHOUSE — EVIDENCE — WAREHOUSEMAN NOT LIABLE. — In an action to recover damages for loss by leakage from plaintiffs' barrels of spirits stored in defendant's warehouse, it appeared that when the barrels arrived at the warehouse they were duly inspected and reported to be in proper condition to be piled, and they were piled by defendant in the usual method. A few weeks later defendant discovered a leakage and notified plaintiffs, who thereupon went to the warehouse and found that several of the barrels showed excessive leakage. They sent competent parties to examine the barrels, the result of whose examination showed that the leakage was caused by defective cooperage. There was no evidence of negligence on defendant's part, it not being shown that there was any usage among warehousemen requiring continuous inspection in such cases, nor was it shown that the warehouse was improperly constructed, or subject to improper drafts by winds or otherwise. *Held*, that the evidence failed to show that defendant was negligent, the defective cooperage being the cause of the leakage, and judgment for plaintiffs reversed (1).

IN BANK. Appeal from Superior Court, City and County of San Francisco.

Action by Rudolph J. Taussig and others against Bode & Haslett, a corporation. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. *Judgment reversed.*

GEO. T. WRIGHT, for appellant.

REINSTEIN & EISNER, for respondents.

PER CURIAM. — Action to recover damages for loss from sixty-four barrels of spirits deposited in defendant's warehouse. The case was tried before a jury. Plaintiffs recovered a verdict. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying the defendant's said motion. It is claimed by defendant, and we think correctly, that the evidence is insufficient to justify the verdict. The defendant is and was at all the times mentioned in the complaint engaged in the business of keeping a bonded warehouse. It is alleged in the complaint that about the 20th day of January, 1896, the defendant, for hire, received on storage from plaintiffs sixty-four barrels of spirits, for the purpose of safely storing and keeping, and returning the same

1. For other actions, from 1897 to date, relating to Liability of Warehousemen for Damage to Property stored in Warehouse, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

upon demand; that "defendant did not well or safely or properly store, handle, keep, or return said barrels or packages, and said spirits contained therein, but, on the contrary, said defendant improperly, carelessly, and negligently stored, handled, and kept said barrels or packages and said spirits, and in consequence of said carelessness and negligence, and of said improper handling and storage of said barrels or packages, * * * a large quantity of said spirits was permitted to leak out of said barrels, and to become lost and destroyed."

The plaintiffs having alleged damage by reason of the negligence of defendant, the burden was upon them to prove such negligence affirmatively. Shear. & R. Neg. (5th ed.), sec. 57; Schouler, Bailm. & Carr. (3d ed.), sec. 23; Jackson *v.* Railroad Co., 23 Cal. 269.

The evidence is substantially without conflict, and shows that on the 20th day of January, 1896, the spirits arrived at defendant's warehouse, and, upon notification being made to them, plaintiffs sent their agent to inspect the goods. After such inspection the agent reported to defendant that the lot was in proper condition to be piled, and the barrels were at once piled by defendant in the usual method followed by it. The method of handling the barrels and of piling them was shown to be proper. They were stored two tiers in height, and dunnage, or strips of wood, placed between the first bilge hoop and the second bilge hoop for the barrels to rest upon. On March 4, 1896, the defendant for the first time discovered that some of the barrels were leaking, and immediately telephoned to plaintiffs. Plaintiffs went to the defendant's warehouse, and upon receiving the sixty-four barrels found that eight of them showed excessive loss by leakage. One barrel was practically empty, three or four leaking pretty badly, and the others leaking to some extent. The total amount of leakage over and above the ordinary allowance for evaporation was 181 1-2 running gallons, or 225 1-2 proof gallons, of the value of $434.50. The plaintiffs immediately sent Nyland and Herbert, two competent parties, to examine the barrels, to determine as to whether or not the cooperage was defective. The witness Nyland testified: "I took the head out of the barrels, and found they didn't have as much glue in as other barrels had. * * * I found four or five of the joints that were caulked with a kind of string, something like a lamp wick, the same as they use around distilleries and warehouses, and around places where there are leaky joints * * * The glue in the barrel stuck in most places, in what I call the most defective places. From my knowledge as an expert, the fact that the gluing did not stick in

some places would account to a great extent for the leakage from that barrel.' The witness Herbert testified: "The packages I saw needed driving very much. They were shrunk. I could tell from my examination whether the wood from which they were made was or was not properly seasoned. It was not well seasoned. A barrel that was made of such wood as that would be dangerous, and likely to shrink and cause leakage. I did not make any examination of the inside of those barrels at that time, but about that time I examined the inside of four of them that had the heads out. I found that they were not properly glued." The evidence further shows that defendant, during the two years prior to the trial, had on storage in the same warehouse over 18,000 packages, and, except the leakage complained of in this action, there was no other leakage in excess of the government allowance, which is known as the "Carlisle" allowance.

The above evidence not only fails to show any act of negligence on the part of defendant, but shows that the leakage was the result of the defective cooperage of the barrels from which the leakage occurred. It is claimed that the fact that defendant did not inspect the barrels and endeavor to discover leakage is evidence of negligence. The evidence shows that the barrels were in apparently good condition when received by defendant and placed in its warehouse, and that they remained there only about six weeks. It further shows that in such case there should be ordinarily no leakage. There is no evidence tending to show that it was the duty of defendant to continuously watch and inspect the barrels, or that there is any such usage among warehousemen. The defendant was required to use ordinary care. It was required to use such care and diligence as prudent persons in the same class of business are wont to exercise towards such property or in the management of their own property under like circumstances.

It is further claimed that the two rows of barrels were piled chine to chine, with not sufficient space between them to admit any one going in between the rows to inspect the ends of the barrels. It does not appear that it is the usage or custom for warehousemen to pile barrels with space sufficient to go between the rows. In fact, the witness Robin testified that he was familiar with the custom of storage of spirits in the bonded warehouses in San Francisco, and that in some of the warehouses they packed the barrels chine to chine. There is no evidence that the warehouse was improperly constructed, or subject to improper drafts by north winds or otherwise. The rule invoked by plaintiffs that a *prima facie* case is made out against a warehouseman who refuses to deliver property stored

with him upon proof of demand and refusal to deliver, and that the burden is then shifted upon the warehouseman to account for the property, does not apply to the facts of this case. Here there was no refusal to deliver the identical barrels that had been stored. The plaintiffs received the barrels. The leakage had occurred while they were on storage. The question was as to whether the leakage was caused by defendant's want of ordinary care. We cannot say as a matter of law that it was want of ordinary care in defendant not to inspect the separate barrels for six weeks. It would seem to us that if the barrels were properly made, for the purposes for which they were used — the holding of spirits — and were in good condition on the 20th day of January, 1896, and properly stored in the warehouse, the presumption would be that they would not leak out their contents by the 4th of March, 1896. All the above facts are shown to be true by the reecord, except that the barrels were properly made. It appears that they were not properly made, and the defective cooperage must have been the cause of the leakage. It is unnecessary to discuss the other questions raised in the record.

The judgment and order are reversed.

MORRIS v. THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Supreme Court, Florida, February, 1901.

CHILD STRUCK BY TRAIN AT RAILROAD CROSSING — DEGREE OF CARE — CONSTRUCTION OF STATUTE. — 1. Section 1, c. 4071, Laws 1891, was adopted here from the Code of the State of Georgia. Under its provisions, what will constitute the amount or kind of diligence that will be required as "ordinary and reasonable" must necessarily vary under different circumstances. It cannot be measured or ascertained by any fixed and inflexible standard, because the words just quoted are themselves relative terms, and what, under some conditions, would be ordinary and reasonable diligence, might, under other conditions, amount to even gross negligence.

2. In said statute (chapter 4071, Laws 1891), the term "ordinary care" is not used in the narrowest and most confined sense of the word "ordinary," but is intended therein to require of railroad companies, in the cases falling within its provisions, all the care and diligence ordinarily due from them, under like circumstances, exigencies, and conditions in like cases, such care and diligence to be in every case covered by the statute, strictly commensurate with the demands and exigencies of the occasion, and by the relationship that the company bears at the time to the party in question.

It is not the design of this statute, in its use of the word "ordinary," to abrogate established phrases, such as "highest degree of care," expressive of the comparative degrees of care due from such companies in varying cases to persons occupying differing relations to the company, and surrounded by varying circumstances and conditions. Its meaning is that, in order to fulfil the required measure of "all ordinary and reasonable care and diligence" in the particular case of one of its passengers, *e. g.*, it must exercise all the care and diligence ordinarily due to passengers, which, by comparison, is the highest degree of care strictly and reasonably commensurate with his relationship as such to the company and with the circumstances and exigencies of the situation.

(Syllabus by the Court.)

ERROR to Circuit Court, Duval County.

Action by William Herman Morris, by W. J. Morris, his next friend, against the Florida Central and Peninsular Railroad Company. From judgment for defendant, plaintiff brings error. *Judgment reversed.*

The plaintiff in error, William H. Morris, by W. J. Morris, his *prochein ami*, on the 24th day of January, 1895, instituted his action of trespass for personal injuries against the defendant in error, the Florida Central and Peninsular Railroad Company, in the Circuit Court of Duval County. The original declaration in the cause is as follows:

"1. Herman Morris, by his next friend, William J. Morris, through Fletcher and Wurts, his attorneys, sues the Florida Central and Peninsular Railroad Company, a corporation organized and doing business under the laws of the state of Florida, for that heretofore, to wit, on the 11th day of December, A. D. 1894, the defendant was the owner and operator of a line of railroad leading into and out of the city of Jacksonville, in the county and state aforesaid, and by means of the said lines of railroads was engaged in the business of carrying goods and passengers for hire, and in furtherance of its said business on the day aforesaid the defendant owned and maintained in the city of Jacksonville a large number of tracks, comprised within certain limits called a yard, which said tracks were then in use for the purpose of delivering and receiving freight and making up defendant's trains; that one of said tracks, to wit, the north track, nearest Bay street, in said city of Jacksonville, extended from a switch near the viaduct in said city eastward, to and along the rear of stores on Bay street, across the end of Cedar street in said city, if projected south from Bay street, and nearly opposite the intersection of said Cedar street with said Bay street the defendant commonly kept and maintained an opening to its yard and roadway leading across said north track, in order to afford access to its other

tracks lying south of said tracks, and to afford ingress and egress for doing its business in connection with its tracks beyond and south of said crossing and said north track; that on the day aforesaid the plaintiff lawfully went into said opening and on said crossing, and there were box cars east of said opening or crossing, but none west thereof, on said track, but as plaintiff reached said track, and was lawfully crossing the same, a train belonging to the defendant, and controlled by servants of the defendant, and propelled by a locomotive called a 'pusher' or 'switch' engine belonging to the defendant, without any notice or signal to him, but through the negligence of the servants of the defendant then in the employ of the defendant, the said train was propelled backward with great speed, striking the plaintiff, and knocking him down, and the rear trucks of the car of the train thus propelled ran over plaintiff, and crushed, mashed, and mangled his left arm in such manner as to render it necessary that the said arm should be amputated between the wrist and elbow, and also mashed and mangled and tore the flesh from the plaintiff's leg below the knee, by reason of which the plaintiff suffered, and still suffers, great bodily harm and mental anguish, and is maimed for life, and plaintiff claims $20,000 damages.

"2. The plaintiff, Herman Morris, by his next friend, William J. Morris, further sues the defendant, the Florida Central and Peninsular Railroad Company, a corporation as aforesaid, for that the defendant was possessed of a railroad locomotive and train of cars attached thereto, and was by its servants driving and conducting the same upon its certain track in the city of Jacksonville, county and State aforesaid, and the plaintiff was lawfully crossing the said railroad track, and the defendant, by its servants, so negligently drove and conducted the said engine and train that thereby the same was and were driven against the plaintiff, and severely injured him; wherefore the plaintiff says he has sustained damage to the amount of $20,000.

"3. The plaintiff further sues the defendant for that heretofore, to wit, on the 11th day of December, A. D. 1894, in the city of Jacksonville, Duval County, Florida, the plaintiff walked upon and along a certain roadway, open to the public, extending from Bay street, through uninclosed grounds, across the track of defendant, nearly opposite the intersection of Bay and Cedar streets, in the city of Jacksonville, from Bay street to other tracks of defendant; and at a certain crossing of the said roadway and a certain railroad of the defendant, to wit, the north track in its yard in said city of Jacksonville, the defendant was then and there possessed of a certain locomotive engine, and train of cars then propelled thereby, which

said locomotive engine and train were then and there under the management of divers then servants of the defendant, who were then and there driving the same upon and along the said railroad, near and towards the crossing aforesaid; and while the plaintiff, with all due care and diligence, was then and there walking across said railroad track at the said crossing upon the said railway there, the defendant then and there, by its servants, so carelessly and improperly drove and managed the said locomotive engine and train that by and through the negligence and improper conduct of the defendant, by its servants in that behalf, the said train was then and there run upon and struck with great force and violence the plaintiff, and thereby the plaintiff was knocked down, and the rear trucks of the rear car of the said train ran over and upon his left arm and leg, tearing and mashing the flesh from his said leg, and so mangling, crushing, and mashing his said arm as to render it necessary to amputate it between the elbow and wrist, and the plaintiff was thereby greatly wounded, bruised, and hurt, and was maimed for life, and he became sick, sore, lame, and disordered, and so remained for a long space of time, to wit, hitherto, during all which time he, the plaintiff, suffered great pain; wherefore the plaintiff says he is injured and has sustained damages to the amount of $20,000, and therefore he brings his suit.

"4. And the plaintiff further sues the defendant for that heretofore, to wit, on the 11th day of December, A. D. 1894, the defendant owned and operated a line of railroad leading into the city of Jacksonville, county of Duval, aforesaid, and was then and there engaged in the business of carrying freight and passengers for hire, and at its terminus in said city of Jacksonville it used and maintained a large number of tracks comprised within its depot grounds or yard, lying south of Bay street, and extending along the same from Bridge to Hogan street, in said city of Jacksonville, and across the ends of Clay, Cedar, and Julia streets; that at said time defendant's yards and tracks opposite the intersection of Bay and Cedar streets were accessible by an open roadway corresponding to an extension of Cedar street south, which was kept open by defendant, and at this point, for the width of some forty feet, there was an open roadway or driveway entering defendant's grounds, winding to the right a short distance, and then extending between coal bins, one on either side, across defendant's track, some distance southward, to other tracks of defendant; that defendant had no inclosure of its said grounds as aforesaid at this point, but maintained this opening and roadway, so leading across its tracks as aforesaid, out to Bay street; that the plaintiff on the day aforesaid was living with

his parents in the second story of a building on the south side of Bay street, fronting the same, and extending back to the northerly track of defendant, on which some box cars were standing, near and west from said building; that from the front of said building on Bay street said opening or driveway leading to defendant's grounds and across its tracks was west about one hundred feet; that plaintiff was then, to wit, three years and four months of age, and had always been carefully protected, looked after, and cared for by his parents, and forbidden going on the streets alone; but the said day, without the fault or negligence or lack of due care on the part of his parents, and unknown to them, he went alone into a store next door to where he lived, and thence into the yard of defendant through said uninclosed place along said driveway, and to and upon its said northerly track, which was exposed as aforesaid, being its first track south of Bay street, and at said crossing leading between the said bins on defendant's said track was playing as a child of his age naturally would, being attracted there by said railway and said tracks and said cars and the said uninclosed grounds; that plaintiff, being of the age aforesaid, was incapable of understanding and appreciating the danger of his position, or that he was technically incautious or trespassing; that plaintiff was and is deaf and dumb; that he was in said position but a few minutes when the locomotive engine, called a 'pusher' or 'switch' engine, in control and under direction of defendant's servants, violently pushed and drove a train of cars of the defendant, from the direction of the switch located in said yard some distance west of where plaintiff stood, said track turning gradually southward in its westerly course from said crossing towards the switch eastward, to and upon and against the plaintiff with great force; that no signal was given, there was no switchman or brakeman on the rear of said train so driven as aforesaid, and without notice or warning to the plaintiff said train was negligently shoved and driven by said engine with great violence, and was negligently forced down said track upon the plaintiff, detached from said engine, and uncontrolled by a brakeman or switchman or otherwise, and after said train struck plaintiff it was only stopped by colliding with said box cars standing on said track just east of said crossing; that through the negligence of defendant, by its servants, this plaintiff was violently knocked down by said train, his left arm was mashed and crushed so that it became necessary to amputate it between the wrist and elbow, and his left leg was mangled and mashed, and he was otherwise hurt, bruised, and injured. By reason of defendant's negligence, by its servants as aforesaid, the plaintiff was injured as aforesaid, and was maimed for

life, and became and was sick, sore, lame, and so maimed, to wit, hitherto, during all which time plaintiff suffered great pain, and plaintiff claims $20,000 damages."

To this declaration, and to each of the four counts thereof, the defendant demurred, assigning as grounds of demurrer the following:

"1. Does not state a cause of action.

"2. Does not state facts showing negligence on the part of defendant.

"3. Is vague, indefinite, uncertain as to the alleged road at the point where said plaintiff is alleged to have been injured.

"4. The declaration does not state facts showing that the point at which the injury occurred was upon a public highway on which the plaintiff and the public had a right to be at the time of the alleged injury."

And to the second count the following additional grounds of demurrer:

"5. Second count states no facts whatever showing cause of action or negligence on part of defendant."

And the following additional grounds of demurrer to the fourth count:

"6. This count shows negligence of plaintiff and his parents in permitting plaintiff to attempt to cross the tracks of defendant."

This demurrer was sustained by the court, and the plaintiff filed his amended declaration, as follows:

"Herman Morris, by his next friend, William J. Morris, by Fletcher and Wurts, his attorneys, sues the Florida Central and Peninsular Railroad Company, a corporation organized and doing business under the laws of the State of Florida, for that heretofore, to wit, on the 11th day of December, 1894, the defendant owned and operated a line of railroad leading into the city of Jacksonville, in said county and State, and having its terminus in the said city of Jacksonville, and that it possessed a tract of land lying adjacent to Bay street, which said Bay street is the most frequented thoroughfare of the said city, and the plaintiff further avers that the said tract of land on the day aforesaid was used by the defendant as a switch and freight yard, and was in constant use for loading and unloading freight cars, and for making up trains by switching cars back and forth, all of which operations were naturally attractive and interesting to a child of tender years, and were likely to cause a child of tender years to wander onto the said premises, and to expose itself to injury upon the tracks of the said yard; and the plaintiff further avers that the position, occupation, and uses of the said tract of land as aforesaid were well known to the officers of

the defendant, and they further well knew that the uses aforesaid would naturally interest and attract a child of tender years, and would naturally induce a child of tender years to wander upon the said premises, and to expose itself to injury from the use aforesaid, all of which were in their nature dangerous to life and limb; and the plaintiff further avers that at a point on said Bay street opposite to the intersection of Bay and Cedar streets, much frequented by pedestrians of all ages, including children of tender years, the defendant maintained an open roadway leading from said Bay street into the said premises, and around and among the defendant's tracks, which said roadway on the day aforesaid was in common use by all persons having business with the defendant to receive or deliver goods upon the said premises, and which said roadway had every appearance of being a highway open to the public; and the plaintiff further avers that the existence of the said roadway, and its location and use on the day aforesaid, were well known to the officers of the defendant, yet the defendant on the day aforesaid wantonly, and with a reckless disregard for human life, was guilty of gross negligence, in that no barrier or guard was maintained or stationed at the intersection of the said roadway with said Bay street, and no precautions whatever were taken to prevent children of tender years from wandering into and upon the said premises among the shifting trains; and the plaintiff avers that he was on the day aforesaid of the age of three years and four months, and had always been carefully protected, looked after, and cared for by his parents, and had been forbidden to go on the streets alone, but on the said day, without the fault or negligence or lack of due care on the part of his parents, and unknown to them, he went alone into a store next door to where he lived, and thence into the yard of defendant through said uninclosed place along said roadway, and to and upon one of the defendant's tracks, which was exposed as aforesaid, being its first track south of Bay street and in said yard, and was there playing as a child naturally would, being attracted there by said roadway and said track and said cars and the said uninclosed grounds; that plaintiff, being of the age aforesaid, was incapable of understanding and appreciating the danger of his position, or that he was technically incautious or trespassing; that plaintiff was and is deaf and dumb, and that he was in said position but a few minutes when a locomotive engine called a 'pusher' or 'switch' engine, in control of and under direction of defendant's servants, violently pushed and drove a train of cars of the defendant from the direction of the switch, located in said yard some distance west of where plaintiff stood, said track turning gradually

southward in its westerly course from said crossing towards the switch, eastward to and upon and against the plaintiff with great force; that no signal was given, there was no switchman or brakeman on the rear of said train so driven as aforesaid, or at said crossing, or any other person to give any warning or signal, and without notice or warning to the plaintiff said train was negligently shoved and driven by said engine with great violence, and was negligently forced down said track upon the plaintiff, and after said train struck said plaintiff it was only stopped by colliding with said box cars standing on said track just east of said crossing; that through the negligence of said defendant, by its servants, this plaintiff was violently knocked down by said train, his left arm was mashed and crushed, so that it became necessary to amputate it between the wrist and elbow, and his left leg was mangled and mashed, and he was otherwise hurt, bruised, and injured. By reason of defendant's gross and wanton negligence by its servants as aforesaid, the plaintiff was injured as aforesaid, and was maimed for life, and became and was sick, sore, lame, and so maimed, to wit, hitherto, during all which time plaintiff suffered great pain, to the damage of plaintiff $20,000.

"2. And for second count to the amended declaration the plaintiff avers all the averments of the first count, and further avers that on the day aforesaid the said roadway across and among said tracks was open, and customarily used by great numbers of people, which was known to the officers of the defendant, and that the agents and servants of the defendant were guilty of gross and wanton negligence, in this: that they failed to provide any person to stand on the rear of or near the said moving car to warn persons of the danger therefrom, and failed to give any signal of the approach of the car in any way, by reason whereof the plaintiff was injured as aforesaid. The plaintiff claims $20,000 damages."

To this amended declaration, and to each of the counts thereof, the defendant demurred upon the following grounds:

"1. Said counts show on their face that plaintiff was not entitled to be on the track of the defendant where he was hurt, and that the plaintiff was a trespasser on same.

"2. Show no right of plaintiff to be on the track of defendant.

"3. Does not show any intentional injury inflicted by defendant, which is necessary, in case of this kind, to base recovery against defendant upon.

"4. It is insufficient to state as a conclusion that the premises of plaintiff were attractive and interesting to the plaintiff, and caused the plaintiff to expose himself to injury.

"5. Does not show that at the point where plaintiff was injured defendant allowed and maintained an open roadway to the public.

"6. The plaintiff, being an infant of the years claimed in the declaration, and deaf and dumb, required all the more care on the part of the parents that he should not be permitted to go upon the track of the defendant.

"7. Does not allege that defendant's employees saw plaintiff on the track, or had any knowledge of his being on the track, at the time or before he was hurt.

"8. Does not state a cause of action.

"9. Does not state facts showing negligence on part of defendant.

"10. Is vague, indefinite, uncertain as to the alleged road at the point where said plaintiff is alleged to have been injured.

"11. Does not state facts showing that the point at which the injury occurred was upon a public highway on which the plaintiff and the public had a right to be at the time of the alleged injury.

"12. Shows negligence of plaintiff and his parents in permitting plaintiff to attempt to cross the tracks of defendant."

This demurrer was also sustained, and, the plaintiff failing to allege further, final judgment was rendered in favor of the defendant and against the plaintiff, from which judgment the plaintiff below took writ of error to this court.

FLETCHER & WURTS for plaintiff in error.

JOHN A. HENDERSON and JOHN C. COOPER, for defendant in error.

TAYLOR, CH. J. (after stating the facts): The rulings of the court below, upon the demurrers to the original and amended declarations, and the entry of the final judgment thereon, are assigned as error.

The gist of the contention made by these demurrers is that neither of the counts of the original or amended declaration, when confessed to be true, makes out a case of legal liability against the defendant company.

There are four counts to the original declaration and two to the amended declaration, and for convenience we will refer to them as the 1st, 2d, 3d, 4th, 5th, and 6th counts, in the order in which they appear in the accompanying statement.

The merits of the declaration involve a discussion of the following section 1 of chapter 4071 of the Acts of the Florida Legislature of 1891: "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have

exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." This section, as will be seen on comparison, was adopted here from the statutes of the State of Georgia (Code Ga. 1873, sec. 3033; Civ. Code 1895, sec. 2321), and seems to have been originally enacted there as early as the legislative session of the years 1855 and 1856.

In the well-considered case of Crawford *v.* Southern R. R. Co. 106 Ga. 870, 6 Am. Neg. Rep. 459, 33 S. E. Rep. 826, in discussing this statute, the court, quoting approvingly from Holland *v.* Sparks, 92 Ga. 753, 18 S. E. Rep. 990, says: "What will constitute the amount or kind of diligence which will be required as 'ordinary and reasonable' must necessarily vary under different circumstances. It cannot be measured or ascertained by any fixed and inflexible standard, because the words just quoted are themselves relative terms, and what, under some conditions, would be ordinary and reasonable diligence might, under other conditions, amount to even gross negligence. For instance, for most purposes, running a passenger train through the country at the rate of twenty-five miles an hour would be safe, prudent, and proper, while to run the same train at this rate over a crossing in a crowded city would amount to wantonness. The measure of diligence due, therefore, by a railroad company to any person, is a relative one, and what is or is not due diligence must be arrived at in every case with reference to the surrounding circumstances, and the relations which, for the time being, the company and the person in question occupied towards each other." And again, in the same case (Crawford *v.* Railroad Co.), it is said: "Admitting, for the sake of the argument, that the general rule is that a railroad company owes no duty to the trespasser who is upon or dangerously near its track in front of a moving train, until its servants have discovered his presence there, and, therefore, so far as his safety is concerned, is not obliged to maintain a lookout in the direction in which the train is moving, we do not think that this could properly be held to be a uniform, fixed, and invariable rule, applicable alike to all cases and under all circumstances. Conduct which might, under one set of circumstances, show that all ordinary and reasonable care and diligence had been observed, might, under a different set of circumstances, be insufficient to show an observance of such care and diligence. We think that such a rule could mean no more than this: Taking the locality where the train is running, and all the surrounding circumstances, if those in control of the movement of the train have no reason to apprehend that there may likely be a human being on the track in front of the engine they are under no duty to one who may in fact

be there until they have actually discovered that he is there. But if, from the locality or surrounding circumstances, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then it seems to us it is the duty of the employees of the company to keep a lookout ahead of the train. * * * Suppose that a locomotive engineer knows that, in a particular locality, people, and especially children, without even an implied license of the railroad company, are likely to be upon the railroad track; can he, while his train is rushing at great velocity through this locality, fail to look down the track in front of him, without being guilty of negligence relatively to a child who may be injured or killed by the locomotive? Are people, children as well as adults, likely, at least in daylight, to be very near or upon a railway track within the limits of a populous city, at points where they have no right to go upon the right of way of the company? If they are, is a man charged with the running and control of a railroad train * * * under no duty, relatively to such people, when his train is running through such a city, either to slacken its speed or to look ahead of his engine? These are questions which we feel sure no court can, as mere matters of law, decide in the negative." This construction thus put upon this statutory phrase, "all ordinary and reasonable care and diligence," the absence of which in cases of personal injury by railway companies fastens them with legal liability, is consonant with the general definition of "negligence" as entertained by many of the courts and by eminent text writers. Thus, in Balt. & Ohio R. R. Co. *v.* Jones, 95 U. S. 439, 7 Am. Neg. Cas. 340, it is defined as follows: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion." The latter clause of this definition the writer would amend as follows: The duty is dictated and measured by the exigencies of the occasion, as they were known to exist, or should reasonably have been known or expected to exist, from other known and existent facts and circumstances, by the party charged with fault. Kay *v.* Railroad Co., 65 Pa. 269, 3 Am. Rep. 628; Railway Co. *v* McDonald, 152 U. S. 262, 14 Sup. Ct. Rep. 619; Young *v.* Clark, 16 Utah, 42, 50 Pac. 832; Blankenship *v.* Railroad Co., 94 Va. 449, 2 Am. Neg. Rep. 662, 27 S. E. Rep. 20; 2 Shear. & R. Neg. (5th ed.), sec. 484; Railroad Co. *v.* Williams, 37 Fla. 406, 20 So. Rep. 558; Mitchell *v.* Railroad Co., 68 N. H. 96, 34 Atl. Rep. 674; Railway Co. *v.* Slattery,

3 App. Cas. 1155 (1). Of course, we do not wish to be understood, in what has been said touching the provisions of our statute quoted above, as holding that in any and all cases, and under any and all circumstances, such companies are to be held only to the exercise of ordinary care in the narrowest and most confined sense of the term "ordinary," but our meaning is that such companies, in every case falling within the purview of this statute, are bound to exercise all ordinary and reasonable care and diligence strictly commensurate with the exigencies of the occasion, and demanded by the relationship that it bears for the time being to the party in question. Thus, it is generally held that to passengers on its trains such companies are due the highest degree of care. The word "highest" is the superlative in comparisons. When the care due from them to their passengers is held up in comparison to that due to a trespasser on their tracks, or to one of their conductors or brakemen, or to a tramp stealing his passage, it may properly be termed "highest," and the purpose of this statute is not to abrogate these established phrases expressive of comparative degrees of care due in varying cases to persons occupying different relations to

1. The facts in Dublin, Wicklow & Wexford R. Co. *v.* Slattery, L. R., 3 App Cas. 1155, were as follows: S. attempted to cross the line of a railway at night at a spot where persons were in the habit of crossing with the acquiescence of the company. At the time he attempted to cross there was a train standing still on the up line in such a position as to prevent a person on the line behind it from seeing anything on the down line. S. came from behind the train on the up line, and on crossing onto the down line was struck by an express train, and killed. It was a rule of the company that express trains should whistle at that point, but evidence was produced that the train had not, in fact, whistled on that occasion. This evidence was contradicted by the servants of the company, who also proved that the train carried lights, and might have been seen by S. before he stepped onto the down line. *Held*, that there was evidence of negligence on the part of the company, and that the case was properly left to the jury. *Held*, also, that where there is conflicting evidence on a question of fact whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury. *Held*, also, that a man is not necessarily to be regarded as having caused or contributed to his own injury by acting in a manner *prima facie* dangerous and imprudent, if there is evidence of acts or omissions by which he may have been put off his guard.

In such action it was also held that when notices have been put up by a railway company, forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices, by way of answer to an action for damages for such injury.

the company, and surrounded by varying circumstances and conditions, but its meaning is that, in order to fulfill the measure of "all ordinary and reasonable care and diligence" in the particular case of a passenger, the care ordinarily demanded towards passengers, which is the highest degree of care, strictly and reasonably commensurate with his relationship as such to the company and with the circumstances of the situation, must be observed; in that of a trespasser on its tracks, all the care and diligence ordinarily and reasonably commensurate with his particular relationship to the company, and with the circumstances of the situation, whenever under a duty to him, though it is a different kind of care, and may properly be said to be much lower in degree to that due to the passenger; and so on, in all the varying cases as they may occur.

Applying these principles to the several counts of the declaration, we think that the first count states a case calling for a defense, and submissible to a jury. Conceding that its allegations are insufficient to show the existence of a public crossing of its tracks at the point of the alleged injury, in the broadest sense of the term "public crossing," entitling the public of right generally to go there, yet it does definitely allege that the defendant itself maintained an open roadway into its yard and across its tracks for the use of all persons receiving or delivering freight from or to it, which is equivalent to an allegation of an express invitation by the defendant to all persons receiving or delivering freight to go there, and that all such persons could lawfully and rightfully go there, and, without giving his age, it also alleges that the plaintiff was lawfully there. Under these circumstances, admitted by the demurrer to be true, it was the duty of the company, dictated by these alleged facts and circumstances, to use all ordinary and reasonable care in moving its cars about such crossing to avoid injury to persons thus invited there, and who might reasonably have been expected to be there. One of such precautions, at least, under the circumstances, was to give the ordinary signals of warning of the approach of its cars, which it alleges was not done, and it is also alleged that it negligently pushed its cars back upon the plaintiff with great speed.

The second count of the declaration, without alleging plaintiff's age, follows the approved form as set out in 2 Chit. Pl. (16th Am. ed.) 576, and is, we think, not subject to demurrer. Contributory negligence, if any, on the part of the plaintiff in such cases, need not be expressly negatived in his declaration, but is matter of affirmative defense. This was true before the enactment of section 2 of said chapter 4071 of the Laws of 1891, and since the adoption

of this statute, that makes contributory negligence only a partial defense, the rule of pleading applies with even greater force.

What is said of the second count applies substantially also to the third count.

Conceding that the fourth count does not sufficiently allege the existence at the place of injury of a public crossing of the defendant's tracks, yet we think it states a case for the submission to a jury on the question as to whether the defendant company used all ordinary and reasonable care and diligence called for, demanded, and dictated by the exigencies of the occasion as they are alleged to have existed. The count in question alleges, in substance, that the defendant maintained its tracks and switch yard in the city of Jacksonville in close proximity to Bay street of said city; that it kept and maintained an opening or roadway, forty feet in width, from Bay street into its yard and across its tracks. What were the uses or purposes for which this roadway was kept or maintained are not alleged, but its existence is clearly stated; that the plaintiff, without fault or negligence on the part of his parents, and without their knowledge, he being of the age only of three years and four months, wandered into said yard through said opening or roadway, and while playing on the crossing, unconscious of his danger, the defendant, by a "kicking switch," and without any signal or warning, and without any brakeman being on the rear end of the cars, or at said crossing, violently backed its cars over him, inflicting the severe injuries alleged. There is no allegation that the defendant inflicted the injury after discovering the plaintiff, or that it was wantonly or purposely done. Under these circumstances, it presents a question for a jury to determine whether, in view of all the surrounding facts and circumstances, such as that the defendant's switch yard was located in a populous city like Jacksonville, that it maintained into said yard and across its tracks an open roadway or driveway leading out to the thoroughfare called "Bay Street," in said city, of the width of an ordinary street, it was reasonable for the defendant and its servants to anticipate that persons would in all probability, at some time or other, wander into its yard, and be there exposed to danger, and, thus anticipating, whether it was in the exercise of all ordinary and reasonable care and diligence, commensurate with the exigencies of the occasion, in not keeping a barrier or guard of some kind at said opening, or, if so, in kicking back cars across the entrance of said roadway into said yard without signals of warning, and without having a brakeman on the rear of said cars, and without having said cars under the control of either a brakeman or an engine, when propelled backwards at great speed.

What is here said of the fourth count applies with greater emphasis to the allegations of the fifth and sixth counts.

It follows from what has been said that the court below erred in sustaining the two demurrers to the original and amended declaration and in the entry of the final judgment thereon against the plaintiff. It is therefore ordered that the judgment of the court be reversed, with directions to overrule the demurrers to the original and amended declaration, and for such further proceedings as may be consonant with law.

WATSON v. LOUGHRAN.

Supreme Court, Georgia, February, 1901.

LIABILITY OF INNKEEPER FOR LOSS OF GUEST'S PROPERTY — DAMAGES — INSTRUCTION. — 1. Where an innkeeper fails to adopt "reasonable regulations for his own protection," and provide for the due "publication of such to his guests," a guest who sustains a loss may recover therefor, unless guilty of "negligence or default * * * of which the loss is a consequence." (1)

2. Whether given acts or omissions of a guest by whom a loss is sustained do or do not amount to such negligence on his part as will constitute a "sufficient defense" to an action against the landlord for the value of lost property is generally a question for the jury. In the present case, however, even if the plaintiff was guilty of negligence which might naturally have resulted in the loss of her property, the defendants were nevertheless liable, because, after the discovery of such negligence by them, the exercise of extraordinary diligence on the part of themselves or their servants would have prevented the loss.

3. The measure of damages to be applied on the trial of an action by the guest of a hotel against the landlord for the loss of property is, in case the latter is liable, the market value of the property at the time of the loss, to which interest may be added and included in the total sum of damages allowed. In determining its value, the cost of the property may be considered, in connection with other facts; but evidence of its cost, without more, is not sufficient proof of its market value.

4. When, in such a case, the evidence as to the value of much of the stolen jewelry for which it was sought to hold the landlord liable related to what it had cost at different times in past years, and did not definitely show its market value at the time the loss occurred, it was erroneous to charge the jury: "This is a question of the value of property, like proving the value

1. For actions relating to Liability of Innkeepers, Storekeepers, Restaurant Keepers, etc., for loss of guests' property, from the earliest period to 1895, see vol. 1 AM. NEG. CAS. Subsequent actions on the same topic to date are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

of a horse that may be in dispute, and you are to be governed by the value of that property as produced upon the stand; whether right or wrong is no concern of yours — you find your verdict according to what is proven to be the value of the property "

(Syllabus by the Court.)

ERROR from City Court of Savannah.

Action by Mary E. Loughran against Watson & Powers. From judgment for plaintiff, defendants bring error. *Judgment reversed.*

WM. R. LEAKEN, for plaintiffs in error.

R. R. RICHARDS, for defendant in error.

FISH, J. — Mary E. Loughran sued Watson & Powers for damages for the loss of certain jewelry which she alleged was stolen from her while a guest of the hotel kept by the defendants. There was a verdict for the plaintiff, and, upon the defendants' motion for a new trial being overruled, they excepted.

1. " An innkeeper is bound to extraordinary diligence in preserving the property of his guests, intrusted to his care, and is liable for the same, if stolen, where the guest has complied with all reasonable rules of the inn." Civ. Code, sec. 2935. Leaving goods in the room of the guest is a delivery to the innkeeper. Id., sec. 2936. " The innkeeper may provide an iron safe, or other place of deposit for valuable articles; and, by posting a notice thereof, may require his guests to place such valuable articles therein, or he will be relieved from responsibility for them." Id., sec. 2937. " In case of loss, the presumption is want of proper diligence in the landlord. Negligence or default by the guest himself, of which the loss is a consequence, is a sufficient defense. The innkeeper cannot limit his liability by a public notice; he may adopt reasonable regulations for his own protection, and the publication of such to his guests binds them to comply therewith." Id., sec. 2938.

Upon the trial of the case under consideration, the defendants did not claim to have posted any notice requiring guests to place valuable articles in an iron safe or other place of deposit provided for such purpose, nor did they contend that they had even adopted reasonable rules or regulations for their own protection. The defendants were liable to the plaintiff for a loss sustained by her while their guest, unless she was guilty of negligence or default of which the loss was a consequence. The plaintiff testified, in substance, that while she was a guest of defendant's hotel, desiring to go out, she placed her jewels in her trunk, which was in her room, locked the trunk and the door of the room, put the trunk key in her pocket, and delivered the door key to the clerk in the office of the hotel, and that while she was out the room and the trunk were

entered, without breaking the locks, and the jewels stolen. If these were the facts, the defendants were liable for the loss.

2. The main defense urged upon the trial was that, if the plaintiff's jewelry was stolen, it was in consequence of her own negligence or default, and not that of the defendants. The defendants claimed that she was guilty of such negligence or default, in that, on the day that the loss is alleged to have occurred, she left her room and the hotel, leaving open both the room door and the trunk in which was the jewelry alleged to have been stolen. Two of the defendants' servants (chambermaids) testified, in substance, that they saw the plaintiff when she left her room on the occasion when the jewels are alleged to have been stolen, and that she left her room door open; that they called her attention to the fact, and that it was unsafe so to leave it, but she hurried awary, saying that her father was waiting for her, leaving the door still open. One of these chambermaids testified that they both had pass-keys at the time, with which they could have locked the door to the plaintiff's room. The other testified that the pass-keys were in the linen room, a short distance away, on the same floor, and that they got them afterwards; and that she, about an hour and a half after the plaintiff left, while putting the plaintiff's room in order, saw that the trunk was open, and, after finishing her work in the room, she came out and locked the door. Thus, from the defendants' own showing, their servants, after discovering that the plaintiff had gone off without closing and locking the door to her room, and being at once impressed with the idea that it was unsafe for her to do so, allowed the door to remain open for an hour and a half, without making any effort whatever to lock it. These servants were on the scene when the alleged negligence or default of the plaintiff occurred, and, had they taken proper precautions to protect the room and its contents, no unauthorized person could have entered it, during the plaintiff's absence, in consequence of such alleged negligence or default on her part. It did not appear when the jewelry was stolen — whether during the time that the room door was left open, or after it had been locked by the chambermaid — but the defense set up was that it occurred in consequence of the plaintiff having left the door open and the trunk unlocked. Admitting the testimony of these chambermaids to be true, it was not sufficient to relieve the defendants from liability. If the plaintiff went off, leaving the door of her room open, and the theft occurred before the chambermaid locked it, and in consequence of the door being left unlocked, then the defendants would be liable, because the exercise of extraordinary diligence on the part of their servants

would have prevented the loss. On the other hand, if the theft was committed after the door was locked by the chambermaid, then the loss was not in consequence of the alleged negligence or default of the plaintiff, and the defendants would, therefore, be liable. The defendants' servants not only failed to exercise extraordinary diligence, but were guilty of gross negligence in not locking the door. Where the relation of principal and agent exists, the negligence of the agent may be imputed to the principal. Civ. Code, sec. 2902. Every servant in the transaction of his master's business represents the master himself, and his acts are, in contemplation of law, the acts of his master. In general, an innkeeper at common law is responsible for the acts of his domestics and for thefts, and is bound to take all due care of the goods of his guests deposited in his hands, or intrusted to the care of his family or servants. 2 Kent, Comm. 592. Section 3029 of our Civil Code provides: "The principal is bound for the care, diligence, and fidelity of his agents in his business; and hence he is bound for the neglect and fraud of his agents in the transaction of such business." For the purpose of caring for and attending to the plaintiff's room, these chambermaids were the agents of the defendants.

3. While, in our opinion, the evidence demanded a finding that the defendants were liable, we do not think there was sufficient proof of the market value of the property lost to authorize the verdict rendered by the jury. The measure of the plaintiff's recovery was the market value of the property at the time it was lost, to which interest could have been added and included in the total sum of damages allowed. In Cliquot's Champagne, 3 Wall. 114, the trial judge charged the jury as follows: "The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such price as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard." This charge was approved by the Supreme Court of the United States. The plaintiff in her petition set out a list of the jewels alleged to have been lost, with the value of each. The verdict was for the exact valuation of the jewels alleged in the petition. The only evidence as to the value of some of them was the price at which they had been purchased, and some of the most valuable of them had been purchased many years prior to the loss. While the cost of property may be considered, in connection with other facts, in determining its value, evidence of its cost, without

more, is not sufficient proof of its market value. In arriving at the amount of their verdict, the jury was clearly controlled by the price paid for some of these jewels, and not by their market value at the time when the loss occurred, and although the evidence for the plaintiff showed that the value of a pair of bracelets at the time of the loss was ten per cent. less than the price paid for them, which was $1,600, the jury evidently estimated their value at the purchase price. As the evidence failed to definitely show the market value of the property at time the loss occurred, a new trial must be granted.

4. In view of what we have just said as to the indefinite character of the evidence as to the value of the property when lost, it was erroneous to charge the jury as follows: "This is a question of the value of property, like proving the value of a horse that may be in dispute, and you are to be governed by the value of that property as produced upon the stand; whether right or wrong is no concern of yours — you find your verdict according to what is proven to be the value of the property." As we have seen, with reference to some of the jewels lost, the only value produced upon the stand was the valuation put upon them by the buyer and seller at the time of their purchase, and the jury, from the charge that they were "to be governed by the value of that property as produced upon the stand," which, "whether right or wrong, (was) no concern of" theirs, might have understood that they were compelled to find the value of these particular jewels in accordance with that valuation.

As, in any view of the case, the defendants are clearly and justly liable to the plaintiff for the market value of the property at the time of the loss, and the sole ground upon which a new trial is granted is that the evidence as to this market value is not sufficient to support the verdict rendered by the jury, a new trial is ordered upon this question alone, with direction that this shall be the only issue submitted to the jury, and that when the jury shall have found the market value of the property at the time of the loss, to which the jury may, if they see fit, add interest to the date of their finding, a judgment shall be entered in favor of the plaintiff against the defendants for the amount so found.

Judgment reversed, with direction. All the justices concurring, except SIMMONS, Ch. J., and COBB, J., absent.

COOPER v. ROBERT PORTNER BREWING COMPANY ET AL.

Supreme Court, Georgia, March, 1901.

LIABILITY OF MASTER FOR INJURY TO SERVANT INFLICTED BY VICIOUS ANIMAL—DEFECTIVE HARNESS—HORSE FRIGHTENED BY HARNESS BREAKING. — 1. When a servant is employed in a business requiring the use of an animal, and the master furnishes an animal which is vicious and dangerous, and this fact is well known both to the master and the servant, it is the duty of the master to furnish such harness and appliances as will render reasonably safe the use of such an animal in the business to be carried on; and if, on account of the failure to furnish equipment of this character, the servant is injured by the animal, without fault on his part, the master is liable to the servant for whatever damages he sustains by reason of such injury, if it further appears that the harness and appliances furnished were known, or could, by the exercise of ordinary diligence, have been by the master known, to be unsafe and unsuitable, and the servant was ignorant of this fact, and could not have discovered it by the exercise of like diligence.

2. The petition in the present case, when taken as a whole, clearly sets forth causes of action arising *ex delicto.*

3. While it is permissible to embrace in one petition in different counts as many causes of action as the plaintiff sees proper, provided they are all of a similar nature, still, since the pleading act of 1893, each count must contain a complete cause of action in distinct and orderly paragraphs, numbered consecutively; and it is not permissible to make paragraphs of one count a part of another count by mere reference to the same.

(Syllabus by the Court.)

ERROR from City Court of Richmond County.

Action by J. J. Cooper against the Robert Portner Brewing Company and another. From judgment for defendants, plaintiff brings error. *Judgment reversed on each bill of exceptions.*

W. K. MILLER and B. WRIGHT, for plaintiff in error.

SALEM DUTCHER, for defendants in error.

COBB, J. — Cooper sued Sheehan and the brewing company, his petition containing three counts. It was alleged in the first count that he was employed by the defendants to open and close their brewery, for which he was to be paid the sum of $2 per week, and to sell their beer at a commission of fifteen cents a case of quarts and ten cents a case of pints, the beer to be delivered by petitioner to customers in the city of Augusta from a delivery wagon. The delivery wagon, horse, harness, and outfit were to be furnished by defendants, properly equipped, and ready for use. The beer was

delivered to petitioner, and he had to account for the same either by making a report of sales or a return of the beer. He had no duty in regard to the use of the wagon, horse, and harness, except to use the same to make deliveries. After he had been in the employ of the defendants for some time, he was notified that he was to change horses, and drive separately to the wagon, one horse in the morning and the other in the afternoon, a pair of horses which had been previously used as a team. As the horses, when driven together, either ran away, or tried to run away, it was proposed by the defendants that they should be separated, and driven single, when the disposition to run away might be corrected. Accordingly, petitioner was ordered to drive these horses separate to the delivery wagon. He objected to this, but was assured by defendants that the horses would not run away if driven separately, and that a strong and sound harness would be furnished him to hold them securely. Petitioner was inexperienced, and knew nothing about horses, and he was notified by defendants that he would have to have a driver, and would be required to pay him himself. Petitioner objected to this, but, seeing that he could not retain his position without complying, and acting upon the assurance of defendants as aforesaid, he selected a negro man to drive the delivery wagon, and agreed with him for the amount to be paid for his services. The driver selected began to drive the horses, and continued to do so for nearly a month, petitioner believing and relying upon the assurance of the defendants that the horses were safe ones when carefully driven. On one occasion when the driver was driving one of these horses, after having made some deliveries, and the horse was proceeding at the customary gait, suddenly, without fault on the part of petitioner and the driver, a portion of the harness known as the "hame strap" broke, and came apart, and the weight of the wagon, it having thereon a small lot of beer, drew the hame upon the collar back over and upon the shoulders of the horse. This frightened the animal, and without warning he lurched forward, and commenced to kick, and petitioner, without fault on his part, was struck by the hoof of the horse, which inflicted a violent injury upon him, from which he has been suffering ever since. He charges that all of his injuries and suffering were caused without fault on his part by the negligence of the defendants in requiring him to use the horse with an insecure, inferior, and dilapidated harness; that the hame strap which broke was unfit to be used as such, being old, and worn out, and that this fact was unknown to petitioner; that, if the hame strap had been one suitable and proper to be used, the occurrence which resulted in injury to petitioner would not have

taken place. In the second count of the petition the facts alleged are substantially as above set forth, and in addition thereto it is charged that the defendants were under a continuing duty to furnish and keep in repair good, substantial harness, and that this duty was all the more imperative because of the character of the horse furnished by them; and that, notwithstanding this duty, they utterly failed to furnish a good harness with which to drive the horse, and knowingly furnished inferior harness, which they well knew was worn, and out of repair — all of which was unknown to petitioner. It is further alleged that in the effort to hold the horse when he began to kick and run the reins attached to the harness broke — that is, came apart at the place where they were stitched together — showing that the stitching was old, worn out, and rotten. The traces also broke, so that there was no means supplied the driver or petitioner to control the movements and action of the horse. The inferior and unsafe condition of the harness was unknown to the petitioner, and in using it petitioner relied upon the statement of the defendants that they would furnish a proper harness to use with this horse. In the third count of the petition the facts alleged are substantially the same as in the two preceding counts, and in addition thereto it is charged that the defendants were under a continuing duty to furnish petitioner a good harness, and keep the same in repair, and they failed to keep the harness in repair, although knowing it was out of repair, and, notwithstanding knowledge of this fact, furnished the same to petitioner, and directed him to use it; the condition of the harness being unknown to petitioner. For a few days before the injury to petitioner the defendants employed a harness maker to overhaul all of their harness, and instructed him to repair first the harness for the team. The harness maker was proceeding to do this, when he was directed by the defendants to stop this work, and go at other work; and while he was gone, without having made the repairs on the harness, the injury to petitioner occurred. Notwithstanding the harness was out of repair, which was known to the defendants, they negligently directed the double harness to be first repaired, instead of that being used on the horse petitioner was driving, and which resulted in injury to him. The judge sustained a general demurrer to the petition, and the plaintiff, in his bill of exceptions, assigns this as error.

1. If the injury to plaintiff had resulted entirely from the fact that the horse used by him was vicious, he would not have been entitled to recover, for the simple reason that, under the allegations in the petition, he was well aware of the fact that the horse which the defendants required him to use was a vicious and dangerous

animal; and therefore, in the use of this animal, he took all of the risks which were incident to an employment where such an animal was to be driven. As we understand the claim of counsel for the plaintiff, they do not contend that he was entitled to recover on this ground, but they base their claim for a recovery upon the ground that both plaintiff and defendants knew that the horse was vicious and dangerous, and that, this being true, it was the duty of the defendants to furnish such harness as would render the use of a horse of this character safe, and to keep in repair harness suitable to be used with a horse of this character. It is alleged that the defendants, recognizing that this duty was upon them, distinctly agreed that they would furnish harness of this character; and that, notwithstanding all this, they furnished harness which was out of repair, and was unsuited for such a horse as was to be used, and that, as a consequence thereof, the occurrence which resulted in injury to the plaintiff took place. It appears from the allegations of the petition that the plaintiff did not desire to use the horse which the defendants required him to use, but that, rather than leave their employment, he consented to take the risk of using such a horse, provided the defendants furnished him with such harness and appliances as a reasonably prudent man would use in driving such a horse as they furnished to him. He took the risks incident to the use of a dangerous horse when equipped with harness suitable to be used with an animal of that character. But he did not take the risks incident to the use of such a horse when equipped with a worn-out and inferior harness. While it appears that the plaintiff knew of the dangerous character of the horse, it does not appear from the petition that he knew that the harness was unsuitable or unsafe. On the contrary, it was distinctly alleged that he was inexperienced, knew nothing about horses, was compelled to hire a driver at his own expense, and had no knowledge whatever of the defective condition of the harness; nor is there anything in the petition from which it can be inferred that the defects in the harness were so patent that they could be observed by one so inexperienced and ignorant as to these matters as the petitioner's allegations declare him to be. The petition alleged in terms that the harness was unsafe and unsuitable, and that this fact was well known to the defendants at the time it was given to plaintiff to be used. As they knew of its condition, the furnishing of it was negligence on their part. As he did not know of it, and could not find it out by the exercise of ordinary diligence, the use of the harness by him was not such negligence as would preclude him from recovering. The court erred in sustaining the general demurrer.

2. In a cross bill of exceptions filed by the defendants, error is assigned upon the refusal of the judge to sustain a special demurrer to the petition setting up that the same was "bad for duplicity, it not appearing therein whether the same be an action *ex contractu* or *ex delicto*." There was no error in overruling this demurrer. When the petition is taken as a whole, it sufficiently appears that each count sets forth a cause of action *ex delicto;* that is, it is a cause of action founded upon a breach of duty growing out of the contract of employment entered into between the plaintiff and defendants. The case is clearly one sounding in tort, although the duty, the breach of which constitutes the tort, arose out of the contract of employment.

3. Further complaint is made in the cross bill of exceptions that the judge erred in overruling a motion to dismiss the case, because the petition did not set forth one cause of action in orderly and distinct paragraphs, numbered consecutively; and because the petition set forth three several and distinct causes of action, separately stated therein as first, second, and third cause of action; and because neither the second nor third causes of action are set forth in orderly and distinct paragraphs, numbered consecutively. As stated above, the petition contains three separate and distinct counts. The first count is composed of fourteen paragraphs, numbered consecutively from 1 to 14. The second count consists of four paragraphs, the first paragraph unnumbered, the remaining three numbered from 2 to 4, consecutively. The first paragraph contains an averment that paragraphs 1 to 11 of the first count are adopted as a part of the second count. The third count consists of four paragraphs, the first unnumbered, the others numbered from 2 to 4, consecutively; the first containing a recital that the averments of paragraphs 1 to 11 of the first count are adopted as a part of this count. In order to meet the motion to dismiss, the plaintiff amended his petition so that the second count should be numbered 1a to 14a, inclusive, and the third count 1b to 14b, inclusive, adding after the words adopting the paragraphs of the first count the following: "And numbering the same, as to this count, 1a to 11a, except that petitioner does not rely in this count on the special undertaking referred to in paragraphs 5 and 6 of the first count." And as to the third count, adding the words, after the adopting clause, at the beginning of the third count: "And numbering the same, as to this count, 1b to 11b, except that petitioner does not rely in this count on the special undertaking set out in paragraphs 5 and 6 of the first count." So that the effect of the amendments is that in the first count all the paragraphs are numbered 1 to 14,

the second count is numbered 1a to 14a, and the third count is numbered 1b to 14b. The first count in the petition was framed in substantial compliance with the pleading act of 1893 (Civ. Code, sec. 4961). The cause of action therein embraced was set forth in orderly and distinct paragraphs, numbered consecutively, so that the motion to dismiss was not well taken as to this count. The second and third counts were not in compliance with the pleading act. While it is permissible for the plaintiff to embrace in his petition as many different counts as he may see proper, provided all of the counts set forth causes of action of a similar nature — that is, all *ex delicto* or all *ex contractu* — each count must set forth a perfect cause of action. One count cannot be added to by a reference to parts of another count, but each count must be embraced in distinct and orderly paragraphs, numbered consecutively. It was, therefore, not permissible for the plaintiff to make a part of the second count paragraphs of the first count by a mere reference thereto, and this defect was not cured by an amendment which simply left the second and third counts in the same condition they were before, except that the eleven paragraphs of the first count were attempted to be embodied by consecutive numbers, instead of by one paragraph adopting the whole eleven. The motion to dismiss should have been sustained as to the second and third counts, unless these counts were amended so as to set forth a complete cause of action in each in distinct and orderly paragraphs, numbered consecutively, and not referring to the other count in any way for the purpose of making paragraphs of the same a part of the second and third counts by adoption or reference. See 4 Enc. Pl. & Prac. 620 [3]; Bliss, Code Pl. (3d ed.), sec. 121. While Hutson *v.* King, 95 Ga. 272 [4], 277, 22 S. E. Rep. 615, was decided after the passage of the pleading act of 1893, the case originated prior to the passage of that act, the declaration having been filed in office on the 17th day of October, 1893, and the pleading act having been approved on the 15th day of December, 1893. See Acts 1893, p. 56.

Judgment on each bill of exceptions reversed. All the justices concurring, except SIMMONS, CH. J., absent.

FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY v. PITTS.

Supreme Court, Georgia, February, 1901.

RAILROAD EMPLOYEE INJURED — DEFECTIVE MACHINERY — DAMAGES — INSTRUCTIONS. — 1. A charge instructing the jury that given conduct under given circumstances would not constitute negligence was erroneous, when, in view of the evidence, it was an open question whether or not this conduct did constitute negligence (1).

2. It was not erroneous, in the trial of an action for personal injuries and pain and suffering resulting therefrom, for the judge, in charging the jury, to

1. See the following recent actions relating to Injuries to Railroad Employees:

Yard master thrown from train by striking against pole — Nonsuit. — In BLACKSTONE *v.* CENTRAL OF GEORGIA R'Y CO. *(Georgia, February, 1901)*, 38 S. E. Rep. 70, action for injury to railroad employee, judgment for defendant rendered in Superior Court, Richmond county, was affirmed. The syllabus by the court states the case as follows: "Upon the trial of an action for damages against a railroad company, it appeared that the plaintiff was injured by being knocked from a moving train in the yard of the defendant by an electric light pole which was erected too near the track; that the plaintiff was a yard master in the employ of the defendant; and that not only were his duties as yard master and his familiarity with the yard such as to charge him with knowledge of the location of the pole, but there was evidence tending to show that he had actual knowledge of its location. *Held*, that the plaintiff was not entitled to recover, and a nonsuit was properly awarded in the case. See Railway Co. *v.* Head, 92 Ga. 723; Walker *v.* Railroad Co., 103 Ga. 820, 4 Am. Neg. Rep. 26, 30 S. E. Rep. 503; Blackstone *v.* Railway Co., 105 Ga. 381, 383."

Brakeman killed on freight train — Res gestæ — Erroneous admission. — In WESTERN & ATLANTIC R. R. CO. *v.* BEASON *(Georgia, January, 1901)*, 37 S. E. Rep. 863, an action for the negligent killing of plaintiff's intestate, a brakeman in defendant's employ, caused by the coming apart of a freight train on which he was riding, judgment for plaintiff was reversed, it being held that the trial court erred in admitting as a part of the *res gestæ* of the casualty under investigation, a narrative given by the plaintiff's deceased husband touching the manner in which he was injured.

Switchman injured — Pleading — Evidence — Nonsuit. — In POSTELL *v.* BRUNSWICK & WESTERN R. R. CO. *(Georgia, January, 1901)*, 37 S. E. Rep. 869, switchman injured while coupling cars, it was held (per syllabus by the court) that "a petition alleging that the plaintiff was an employee of the defendant, and, as such, sustained personal injuries, through the defendant's negligence, while engaged in the work he was employed to do, is not sustained by evidence showing that the relation of master and servant did not exist between these parties, and that the plaintiff was really the servant of another person, and was doing the work in question under his employment by that person." Nonsuit affirmed.

omit calling their attention "to the effect of advancing years upon the capacity of plaintiff to labor," when the declaration did not allege that the injuries complained of were permanent, and the action was apparently brought to recover only the damages sustained before the filing of the petition.

3. The portions of the charge complained of in those grounds of the motion for a new trial not dealt with in the first of the preceding notes were not open to the objection that they were unwarranted by the evidence.
4. In view of the evidence appearing in the record, the error above pointed out is cause for a new trial.

(Syllabus by the Court.)

ERROR from Superior Court, Effingham County.

Action by J. M. Pitts against the Florida Central and Peninsular Railroad Company. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

DENMARK, ADAMS & FREEMAN, for plaintiff in error.

D. H. CLARK, for defendant in error.

LEWIS, J. — J. M. Pitts brought suit against the Florida Central and Peninsular Railroad Company for damages on account of personal injuries alleged to have been sustained through the negligence of the defendant in providing unsafe and defective machinery for the plaintiff, who was its fireman, and in allowing its roadbed to become worn, defective, and dangerous. The defendant filed an answer denying the material allegations of the petition, and pleading that the plaintiff, in consideration of one dollar, had released it from all obligation on account of the injury for which suit was brought. It appears that the plaintiff and his engineer were engaged at the time of the injury in taking an excursion train of the defendant from Fairfax to Savannah, and, in the effort to get to Savannah before the train of a rival railroad, exerted themselves to run their train at the highest possible rate of speed. The plaintiff knew that certain portions of the track were in a very bad condition, having seen men at work repairing the defects the day before the accident. While running at this very high rate of speed a part of the machinery of the engine, known as the "parallel bar," suddenly broke in two, and one of the fragments was hurled through the window of the engine, injuring the plaintiff as described in his petition. The plaintiff testified that he could not tell that the parallel bar was defective until after it was broken, and there was evidence tending to show that careful inspection before the train went out failed to disclose any defect in that part of the machinery of the engine. There was nothing to connect the alleged defects in the track with the plaintiff's injuries, except by inference, while some of the testimony was to the effect that the breaking of the parallel bar took

place at a considerable distance from the place where the repairs had been made, and on a portion of the track which was perfectly safe, and which had never been defective. The jury found for the plaintiff a verdict for $2,000. The defendant excepts to the overruling by the court below of its motion for a new trial.

1. Exception is taken to the following language of the court, used in that portion of the charge dealing with the question as to whether or not the plaintiff was guilty of negligence in assisting the engineer to run the train at a high rate of speed over a portion of the track which he knew to have recently been in a defective condition: "If he was so justified, the fact that he did pass over it in the manner and under the circumstances detailed in the evidence would not of itself constitute negligence on his part upon this branch of the case. This, of course, applies only in the event that you find from the evidence that the defect in the roadbed existed, as a matter of fact, and that it caused the breaking of the parallel bar." We think that under the circumstances this charge was error. It appeared that the plaintiff was thoroughly acquainted with the condition of the track at and near the point where he claimed to have been injured, having passed over the same place only the day before the accident, and many times previously. He also testified to personal knowledge of the bad condition of the road. There was enough in the plaintiff's own testimony for the jury to infer that, if there was any negligence in the rapid running of the train, he participated in it, and voluntarily aided in increasing the speed. The fact that he saw repairs going on would not require a finding that he had a right to believe that the track was in a safe condition, or that he was not negligent in assisting the engineer to run so rapidly over a newly-repaired roadbed. Besides, it does not appear from the weight of the testimony that the breaking of the parallel bar occurred at the point where the track had been defective. The plaintiff himself, in his testimony, does not definitely locate the place where the accident is alleged to have taken place. Questions of negligence are peculiarly for the jury. The charge here dealt with settled in the plaintiff's favor the question that he was not negligent, when under the evidence the jury would have been well warranted in finding that he was, and for that reason the charge quoted was erroneous.

2. The motion for a new trial also complains that the court erred in charging the jury concerning the extent of the plaintiff's injuries, and in not calling their attention to the effect of advancing years upon the capacity of the plaintiff to labor. A reading of the petition plainly shows that the plaintiff was not seeking to recover for injuries that were lifelong and permanent. Its scheme, manifestly,

was to recover for damages resulting from loss of time and diminished capacity to labor, and for pain and suffering which had accrued up to the filing of the petition. This being so, the judge would not have been warranted in charging as to future diminished capacity to labor, or failing power to work, resulting from advancing age. The mortality tables were not introduced in evidence, nor was any attempt made to prove permanent or lasting injuries. We think, therefore, that no error was made to appear in the complaint made in this ground of the motion.

3. The motion for a new trial sets forth extended extracts from the charge of the court, and complains that they were unwarranted by the evidence. Apparently these portions of the charge were abstractly correct, and an examination of the brief of evidence shows that there was testimony upon which to base them.

4. We order a new trial in this case because one of the most vital questions in it, to wit, whether or not the plaintiff was himself guilty of negligence, was improperly treated by the court in the charge to the jury. There was ample evidence, even in the plaintiff's own testimony, to show that he was negligent in unnecessarily taking dangerous and hazardous risks. He knew the condition of the track, having traveled over it a number of times just prior to the accident, and he voluntarily aided in bringing about the high rate of speed which he claims caused his injuries. The charge dealt with in the first division of this opinion practically instructed the jury that in all these respects the plaintiff was not negligent, and thus, if it did not constrain a finding in his favor, went far in that direction.

In view of the whole testimony in the case, this was such error as to demand a new trial. Judgment reversed. All the justices concurring, except SIMMONS, CH. J., and COBB, J., absent.

GEORGIA COTTON-OIL COMPANY v. JACKSON.

Supreme Court, Georgia, January, 1901.

EMPLOYEE INJURED WHILE OPERATING MACHINE — DAMAGES — INSTRUCTION — ORDINARY CARE — DEFECTIVE MACHINE — EVIDENCE. — 1. A charge instructing a jury to take into consideration a plaintiff's "prospects of increased earnings" should not, when there is no evidence to warrant it, be given.

2. The skill and diligence which the law requires an adult employee to exercise to protect himself from being injured by defective or dangerous machinery must at least come up to the legal standard expressed in the words "ordinary care."

3. In testing by this standard given conduct of such an employee, the inquiry should be, not what degree of care his "intelligence and understanding" would have enabled him to exercise under the existing circumstances, but what amount of care might, under such circumstances, be reasonably expected of an ordinarily prudent person who had attained his majority.
4. When the parties to an action on trial were at issue as to whether or not a machine by which the plaintiff had been injured was, at the time he was hurt, out of order, and operating in a dangerous manner, evidence tending to show that shortly thereafter, and while in substantially the same condition, this machine operated in a similar manner, and by so doing injured other persons, was relevant (1).

(Syllabus by the Court.)

1. See the following cases arising out of Injuries to Employees:

Minor employee killed — Incompetency of servants — Evidence — Instructions. — In SMITH *v.* BIBB MANUFACTURING CO. *(Georgia, January, 1901)*, 37 S. E. Rep. 861, judgment for defendant was affirmed, the syllabus by the court stating the case as follows: "1. In the trial of a suit brought by a mother against a master for the homicide of her son, where there was no allegation in the plaintiff's petition that the defendant was negligent in the employment of the servants who had control over the deceased, it was not error to reject the declaration of one of such servants, since deceased, that he had been in the employment of the defendant for only a short time, and did not know what were the duties of the son.

"2. Where all the theories properly arising in a case are covered by correct general propositions embraced in the judge's charge, if amplification of the same is desired, written requests should be made therefor.

"3. The extracts from the charge complained of in the present case, when considered in the light of the portions thereof of which no complaint is made, were not erroneous for any reason assigned. The verdict was amply sustained by the evidence, and no error appears to have been committed which required the granting of a new trial."

Employees injured — Assumption of risk — Nonsuit. — In THOMAS *v.* ATLANTA MACHINE WORKS *(Georgia, January, 1901)*, 112 Ga. 666, 37 S. E. Rep. 885, judgment for defendant was affirmed, the syllabus by the court stating the case as follows: "Taking the evidence as a whole, and considering it in that light which is most favorable to the plaintiff's contention, the occurrence out of which the injury to the plaintiff arose was either a pure casualty or one of the ordinary risks of the particular employment, which the employee necessarily assumed. In either event no liability arose against the defendant, and a nonsuit was properly granted."

MILNER *v.* SOUTHERN R'Y CO. *(Georgia, January, 1901)*, 112 Ga. 666, 37 S. E. Rep. 885, was decided on the authority of the Thomas Case (preceding paragraph), the syllabus by the court stating the case as follows: "The facts in the case of Thomas *v.* Machine Works (*ubi supra*, 112 Ga. 666), are similar to those shown to exist in this case. It was there ruled that no liability existed on the part of the defendant, because the injury occasioned the plaintiff was either a pure casualty or one of the ordinary risks of the particular employment, which the injured person necessarily assumed by his employment. The judgment rendered in that case determines the principles of law involved in this. There was no error in granting the nonsuit."

ERROR from City Court of Atlanta.

Action by David Jackson against the Georgia Cotton Oil Company. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

ABBOTT, COX & ABBOTT, for plaintiff in error.

HOKE SMITH and H. C. PEEPLES, for defendant in error.

LUMPKIN, P. J. — The defendant in error, David Jackson, obtained in the trial court a verdict against the Georgia Cotton-Oil Company for personal injuries, and it brings here for review a judgment overruling its motion for a new trial. The brief of evidence discloses that Jackson was injured while operating, as an employee of the oil company, a machine known as a "former." As the case is to be tried again, we leave open the question whether or not, upon the merits, the plaintiff was entitled to a recovery. The judgment is reversed because, in our opinion, the trial judge committed at least two errors which may have been prejudicial to the defendant company.

1. One of the plaintiff's contentions was that, on account of the injuries he received, his capacity to earn money had been greatly diminished, and that these injuries were permanent in character. In this connection the court, referring to the plaintiff, charged the jury: "You should take into consideration his health, heredity, and age, prospects of increased earnings from experience or skill required, and his diminished capacity as a result of growing years and infirmity, prospects of obtaining steady and remunerative employment, and the like." The petition alleged nothing as to any prospect of increased earnings on the part of the plaintiff, and a diligent study of the brief of evidence fails to disclose that there was any testimony even remotely tending to show that he had such prospects. We are, therefore, of the opinion that the charge above quoted ought not to have been given. While undertaking, in the case of Railroad Co. *v.* Burney, 98 Ga. 1, 26 S. E. Rep. 730, to formulate instructions which might be appropriately given in connection with the mortality and annuity tables, we took especial pains to state precisely when a charge with respect to increased earning capacity would be authorized, viz., when "the evidence so warrants." See page 11, 98 Ga. and page 734, 26 S. E. Rep. We added that "this should not be done unless, in view of all the testimony, the propriety and fairness of such an instruction is manifest."

2, 3. Another charge complained of was in the following words: "It is not enough, to charge the servant with contributory negligence, that he may have known of the fact that the machine was defective, but it must also appear either that he knew that the

continued use of the defective appliance was dangerous, or that the defect complained of rendered the use of the appliance so obviously dangerous as that a person of his intelligence and understanding could perceive it." We do not think this charge correctly stated the standard of diligence required of adult employees. The first sentence of section 2612 of the Civil Code reads as follows: "A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself." This section further provides that, where a servant sues for injuries resulting from defective machinery supplied by the master, it must appear that the servant "did not know, and had not equal means of knowing," of the defects in the machinery, or the danger of operating the same, "and by the exercise of ordinary care could not have known thereof." Construing all together the provisions of this section, its clear meaning is that, while an employee is in every instance bound to exercise for his own protection whatever skill and diligence he possesses, the degree of diligence on his part must in no instance fall short of "ordinary care." The standard of diligence which these words are used to define is well settled. By "ordinary care" is meant that degree of care which might reasonably be expected of an ordinarily prudent person under like circumstances. The case of Pitts *v.* Railroad Co., 98 Ga. 655, 27 S. E. Rep. 189, relied on by counsel for the defendant in error, is not authority for the contrary of what is above laid down. It is true that in the first headnote, which was prepared by Mr. Justice Atkinson, there is a loose expression to the effect that an employee injured by defective machinery would not be precluded from recovering damages merely because he knew of the defects therein, when it did not further appear either that he "actually knew that the continued use of the defective appliance was dangerous, or that the defect complained of rendered the use of the appliance so obviously dangerous as that a person of his intelligence and understanding could readily perceive the danger." The chief justice, however, did not assent to the correctness of the proposition laid down by our Brother Atkinson, but concurred in the judgment rendered in that case for reasons which he set forth in a separate headnote; while the writer dissented from the judgment altogether.

4. The plaintiff, in his testimony, described the machine and the manner of its operation. Among other things, he stated that it had upon it a heavy "slide," which suddenly and unexpectedly "came back" across the machine from the rear to the front thereof, and caught and crushed his hand — a thing which would not have occurred if the machine had not been defective. The

court, over the objection of defendant's counsel, allowed two other witnesses, who had been employees of the oil company, to testify that they had been similarly injured by the coming back of this "slide" in the manner stated. One of them was thus hurt about one week, and the other about three weeks, after the plaintiff was injured. The testimony of these two witnesses was also to the effect that the coming back of the "slide" was due to some defect or defects in the machine; and there was other testimony from which it could have been inferred that no substantial change in the condition or structure of the machine had taken place during the three weeks referred to. The bare fact that these two employees had been injured, standing alone, would have been irrelevant; but it was, in view of the testimony just mentioned, competent for the plaintiff to prove by them that shortly after his injury this machine was in a defective condition, and that because of this the "slide" operated improperly, and in a manner dangerous to employees working the machine. If, in undertaking to relate what occurred with reference to the movement of the "slide," the witnesses incidentally stated that they were hurt in the same manner and from the same cause as the plaintiff, we do not think that permitting them to do so was erroneous. The witnesses were very properly allowed to complete their narrative concerning the improper working of the machine by stating that from personal experience with it they were prepared to testify to its capacity to do harm. At the same time the court should have instructed the jury that all these witnesses stated with reference to this matter was relevant solely upon the question as to what was the condition of the machine at the time the plaintiff was injured.

Judgment reversed. All the justices concurring.

GRADY v. GEORGIA RAILROAD AND BANKING COMPANY.

Supreme Court, Georgia, January, 1901.

TRESPASSER INJURED PASSING BETWEEN CARS IN RAILROAD YARD — RAILROAD COMPANY NOT LIABLE. — 1. In a railroad yard in which there are several tracks in continuous use for the purpose of storing and switching cars and making up trains, and the like, and where the dangerous character of the place is manifest and obvious, there can be no implied license to the public to cross the tracks, either through open spaces casually left between the cars, or under or over the cars. In order to

render the company liable for injury caused to a person who was passing between two cars in such a yard, and whose presence and danger were unknown to the agents and employees of the company, there must be proof of an express license from the company. Railroad Co. *v.* Rylee, 87 Ga. 491, 13 S. E. Rep. 584; 3 Elliott R. R. sec. 1258.

2. Under such circumstances the company owed to the injured person no duty, except not to hurt him willfully or negligently after he was discovered or his danger known. Railroad Co. *v.* Tolbert, 85 Ga. 447, 11 S. E. Rep. 849.

(Syllabus by the Court.)

ERROR from City Court of Atlanta.

Action by S. F. Grady against the Georgia Railroad and Banking Company. From judgment for defendant, plaintiff brings error. The facts are stated in the syllabus. *Judgment affirmed.*

ARNOLD & ARNOLD, for plaintiff in error.

SANDERS MCDANIEL and JOS. B. & BRYAN CUMMING, for defendant in error.

PER CURIAM. — Judgment affirmed.

OCEAN STEAMSHIP COMPANY OF SAVANNAH v. HAMILTON.

Supreme Court, Georgia, March, 1901.

LANDLORD NOT LIABLE FOR INJURY TO SERVANT OF TENANT CAUSED BY DEFECTIVE PREMISES — PRACTICE — APPEAL. —

1. A landlord is not liable for personal injuries to a servant of his tenant arising from a defect in the rented premises, of which the landlord had no knowledge, and which he had not been notified to repair. It was, in the present case, erroneous not to grant a nonsuit (1).

2. When the tenant is in the exclusive possession and control of the rented premises, the landlord is under no duty of examining the same with a view to ascertaining whether or not repairs are needed, unless requested so to do.

3. A party dissatisfied with a verdict cannot, without filing a motion for a new trial, properly bring to this court for review any "ruling, order, decision, or charge" of the court below which did not, either singly or in connection with another or others, necessarily control the finding against the plaintiff in error; nor, in the absence of such a motion, is an attack upon a verdict by direct exception thereto, save as herein indicated, of any avail.

(Syllabus by the Court.)

1. For other actions arising out of the relations of Landlord and Tenant and the Liability for Defective premises, from 1897 to date, see vols. 1-9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See also McAdam's LANDLORD AND TENANT (3d ed.), for a complete exposition of the subject.

ERROR from City Court of Savannah.

Action by Ephraim Hamilton against the Central of Georgia Railway Company and the Ocean Steamship Company of Savannah. Complaint dismissed as to the railway company, and judgment rendered against the steamship company, and it brings error. *Judgment reversed.*

"This was an action for damages tried in the City Court of Savannah before Judge Norwood. The plaintiff testified as follows: 'While working for T. S. Wylly & Co. on the Central Railroad high wharf on the 28th of April, 1900, I was told to take a piece of timber 14x16, about thirty-five feet long, out of the way; so I told the men on the stage to come quick. I had a crowbar in my hand. I snatched up the crowbar, and ran to the end of the timber. I jammed the bar under it, and the men strung alongside of the stick of timber, waiting for a fingerhold. I could not give them the hold there. I told them to look out, and I made a break to go around them to go to the center of the piece with a quick move on me, and in going the wharf broke through with me in a rotten place in the dock, and that threw me. I went clean up to my thigh in the dock. There was no hole in the wharf at the time I went through. The wharf looked as if it was safe, until it broke through with me. The place where I went through looked no different from any other place around there. There was nothing to put me on notice that it was a dangerous place. Afterwards they patched up the wharf. Mr. Skipper, the regular wharf carpenter down there, fixed the wharf. He had a crowbar, and in some places he would hit it like that, and the bar would start on through. I did not see that the plank I stepped on was rotten. It looked just the same as any other wharf. All seemed to be safe. This was a pretty big wharf, and there is constantly lumber piled on some of it. This stick of timber had been piled on this wharf only the day before. They did not keep lumber piled on this portion of the wharf. It was used for sorting orders. I made a hole in this plank big enough for my thigh and hip to go through. I made a break around the crowd to get to the center of the piece, and on my way the plank gave way. There was nothing to show me that the plank was rotten when I started to work on it. The crowbar was not under the stick of timber when I fell through. I fell through when I was on my way from the end to the center of the stick.' The plaintiff also proved his injury."

LAWTON & CUNNINGHAM, for plaintiff in error.

OSBORNE & LAWRENCE, for defendant in error.

LUMPKIN, P. J. — The bill of exceptions now before us among other things assigns error upon the refusal of the trial court to

grant a nonsuit. The action was brought by Hamilton against the Central of Georgia Railway Company and the Ocean Steamship Company of Savannah for personal injuries. Before any evidence was introduced "the plaintiff dismissed his suit as to the defendant Central of Georgia Railway Company, and the cause proceeded against the Ocean Steamship Company of Savannah as sole defendant." The word "defendant" will, therefore, hereinafter be used to designate the steamship company. The petition alleged, and the answer of the defendant admitted, that the plaintiff was an employee of T. S. Wylly & Co.; that, as such, he was working upon a wharf belonging to the defendant; that "Wylly & Co. were then and there using the said wharf by and with the consent of the said defendant;" and that the particular business in which the plaintiff was employed as a servant of Wylly & Co. was that of "moving lumber and loading the same on vessels moored at said wharf." The tenth paragraph of the petition was as follows: "Petitioner alleges negligence upon the part of defendants in having and keeping in a dangerous condition the said wharf, and letting the same to petitioner's employer for the business petitioner was employed in while it was in such a dangerous condition, and in failing to repair the same and to keep the same in repair while it was so let to petitioner's employer for the business petitioner was employed in." To this paragraph of the plaintiff's petition the steamship company answered "This defendant admits, as stated in the tenth paragraph of said petition, that said wharf was let to said T. S. Wylly Co. for the business petitioner's employer was engaged in, but denies any negligence upon its part in having and keeping the same in a dangerous condition, or that the same was in a dangerous condition when let; and denies any negligence in failing to repair the same and in keeping the same in repair while it was so let." At the hearing the plaintiff was sworn as a witness in his own behalf. His testimony, upon which alone he relied to establish diligence on his part and the alleged negligence of the defendant, is set forth in full in the statement preceding this opinion.

1. The court erred in not granting a nonsuit. It is apparent that the plaintiff signally failed to establish his allegation that the wharf in question was in a dangerous condition at the time it was rented to his employers, Wylly & Co. There is no evidence as to the time when they took possession of the wharf, or as to its condition at that time. For aught that appears, the wharf, when rented to them, may have been in all respects safe and sound. The plaintiff did prove that at the time of his injury a portion of the wharf was in a defective condition; but if ever evidence established the fact that

a defect was latent, it certainly did so in the present instance. This being so, it has not shown that the landlord actually knew of its existence. While, under section 3118 of the Civil Code, a landlord is responsible to a servant of his tenant "for damages arising from defective construction, or for damages from failure to keep the premises in repair," he is not liable because of a failure to repair a defect of which he neither knew, nor ought, in the exercise of reasonable diligence, to have known. Properly construed, this section does not make a landlord responsible as an insurer, but liable only in the event he fails to comply with his statutory duty of keeping the premises in repair. The provisions of this section were in large part codified from the decision of this court in White *v.* Montgomery, 58 Ga. 204, in which it was clearly ruled that the duty of a landlord to make repairs did not arise unless he either knew from personal observation of the existence of defects, or was in some manner put upon notice thereof. In delivering the opinion of the court, Jackson, J., cited approvingly the case of Guthman *v.* Castleberry, 48 Ga. 172, 49 Ga. 272, wherein it was held that, before a landlord was under a duty of making repairs, notice to him of the need thereof was requisite, unless he was himself in a position to know that the making of such repairs was necessary. To the same effect, see Whittle *v.* Webster, 55 Ga. 180; and note the *dictum* of Bleckley, J., in Driver *v.* Maxwell, 56 Ga. 14, to the effect that a landlord is bound to keep the rented premises in a condition reasonably fit for the purposes for which it was intended the same should be used, "on proper notice from his tenant." See also Stack *v.* Harris, 111 Ga. 151, 8 Am. Neg. Rep. 380, 36 S. E. Rep. 615. As we understand it, the section now under consideration was designed simply to embody a rule of law which was well settled and well understood at the time of its codification, and not to enlarge the duty devolving upon landlords with respect to the making of repairs, nor to impose upon them a harsher rule of responsibility than that to which they were already subject. There was in the present case not a particle of evidence tending to show that the steamship company knew of the defective condition of the plank by the breaking of which the plaintiff was injured, or that the company's attention had ever in any manner been called to the same.

2. As will have been noted, the plaintiff alleged, and the defendant admitted, that the wharf had been rented by the steamship company to Wylly & Co. So far as appears, therefore, the premises were in the exclusive possession and control of the plaintiff's employers. There is certainly nothing in the evidence to indicate the contrary. Yet the court charged the jury: "If you find in this case that the

plaintiff was working for T. S. Wylly & Co., and T. S. Wylly & Co. in the course of their business received timber on the wharf of the defendant; that that wharf was in a dangerous condition, and that that condition could have been discovered by the defendant by the exercise of ordinary care; and that the plaintiff, while engaged in his work on the wharf, in the exercise of ordinary care, fell through a rotten place in the wharf, and was thereby injured — then I charge you that you should find for the plaintiff." It cannot be seriously questioned, in view of the evidence and of the admission in the defendant's answer above referred to, that this charge constrained a verdict for the plaintiff. Error was assigned upon it in the bill of exceptions. That it was erroneous we are quite sure. There was, under the existing conditions, no duty resting upon the landlord of looking for or endeavoring to discover the defect in the wharf. The landlord's duty was, after notice of its unsafe condition, to make the needed repairs. A landlord, after parting with the possession of the rented premises, is not in a situation to exercise a constant and unremittent supervision over them, and thus keep himself informed as to the necessity for repairs. On the contrary, as was remarked by Jackson, J., in dealing with the case of White *v.* Montgomery, *supra:* "The use of the tenements really belongs to the tenant during the lease. They are his property to use for the term for which they are rented, and the landlord has no right to enter upon them, except by permission of the tenant, during the term for which they are rented."

3. Besides raising the points already discussed, the bill of exceptions contains certain assignments of error with which we are not called upon to deal because there was no motion for a new trial; and the rulings to which these assignments related, whether taken separately or together, were not such as necessarily controlled the verdict against the defendant; nor did they add aught to the efficacy of the exception to the charge with which we have specifically dealt. See Smith *v.* Smith, 112 Ga. 351, 37 S. E. Rep. 407. The plaintiff in error also undertakes to except "to the verdict of the jury," and to assign "error upon the same," but, of course, the verdict cannot in this manner be brought under review. See Jones *v.* Pitts, 98 Ga. 521, 25 S. E. Rep. 573; Holsey *v.* Porter, 105 Ga. 837, 31 S. E. Rep. 784, and cases cited.

Judgment reversed. All concurring, except SIMMONS, Ch. J., absent.

KILEY v. CHICAGO CITY RAILWAY COMPANY.

Supreme Court, Illinois, February, 1901.

PASSENGER EJECTED FROM STREET CAR — TENDER OF WRONG TRANSFER SLIP — REFUSAL TO PAY FARE — DUTY OF PASSENGER — NOMINAL DAMAGES. — In an action to recover damages for forcible expulsion of plaintiff, a passenger, from one of defendant's street cars, it appeared that plaintiff was given a wrong transfer slip by a conductor of a branch line, which transfer she tendered to the conductor of a car on the connecting line, but the conductor refused to accept same and requested plaintiff to pay fare or get off the car, and on her declining to do either the conductor stopped the car and ejected her therefrom. *Held*, that plaintiff should have either paid fare or left the car in a peaceable manner, seeking redress in the courts for damages sustained, and was not entitled to recover for injuries sustained in being compelled to leave the car (1).

APPEAL from Appellate Court, First District.

Action by Annie E. Kiley against the Chicago City Railway Company. The facts appear in the opinion. From a judgment of the

1. *Passenger ejected from train — Quarantine guard — Nominal damages.* — In ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y CO. *v.* LINAM ET AL. *(Arkansas, February, 1901)*, 60 S. W. Rep. 951, judgment for plaintiffs, W. B. Linam and R. E. Ebbs, on verdict in favor of each for $100 damages, in action for alleged wrongful expulsion from defendant's train, was reversed, the facts (per opinion by BUNN, CH. J.), being as follows: "On the afternoon of the 27th September, 1898, the plaintiffs purchased first-class passenger tickets from defendant's agent at Malvern for Arkansas City, and took passage on one of defendant's passenger trains at once. They remained over night at Little Rock *en route*, and took the train direct to Arkansas City on the morning of the 28th, and reached McGeehee, the last station before reaching their destination, where the Arkansas City branch road leaves the main line, and took dinner there. When the branch-line train started out from McGeehee the plaintiffs got on the platform of the passenger coach and rode thereon until they reached the junction, about half mile distant; and there, they allege, the conductor of the train ejected them from the cars, and they were thus prevented from pursuing their journey to Arkansas City, their destination. The question in this case is whether plaintiffs were put off the train by the conductor, or got off voluntarily, rather than go on further, to a point within two miles of Arkansas City, and there encounter a quarantine guard, acting under rigid orders, as they had been informed, and be put off in a desolate swamp, without accommodations or conveniences of any kind. There is evidence tending to support the latter view of the question Be this as it may, however, the evidence shows that plaintiffs suffered no damage whatever in being put off the cars, if that was the case, and at furtherest they were entitled to nominal damages only, if any. Therefore the verdict is not sustained by the evidence, and for that reason the judgment is reversed,

branch Appellate Court, First Division (90 Ill. App. 275), affirming a judgment for one dollar in favor of plaintiff, she appeals. *Judgment affirmed.*

ASA Q. REYNOLDS (SHOPE, MATHIS & BARRETT, of counsel), for appellant.

WM. J. HYNES and WM. J. FERRY (M. B. STARRING, of counsel, for appellee.

HAND, J. — This is an action by appellant in the Superior Court of Cook County against appellee to recover damages for a forcible expulsion of appellant from a street car in the city of Chicago. The declaration consists of three counts, charging in various forms that while the plaintiff was lawfully upon the car of the defendant she was forcibly ejected and expelled therefrom by the conductor of the defendant in charge of said car, and thereby greatly injured. The defendant pleaded the general issue; also a special plea, in which it was alleged the plaintiff took passage on said car; that she refused to pay her fare or leave the car upon request; that she resisted the conductor's efforts to remove her, whereby the injury to her occurred; and that no more force was used in her removal

and the cause remanded for a new trial."

Forcible ejection of person stealing ride on train — Trespasser killed — Railroad Company liable. — In DORSEY *v.* KANSAS CITY, PITTS. & GULF R'Y CO. (*Louisiana, January, 1901*), 29 So. Rep. 177, judgment for plaintiff for $2,500, in action for damages for forcible removal of plaintiff's husband who was stealing a ride on defendant's train resulting in his death, was affirmed, the syllabus by the court stating the case as follows: Defendant appeals, and asks for the review and reversal of a judgment condemning it to pay damages to the plaintiff, who is the widow of the deceased. Defendant's brakeman, instead of waiting a few moments to oust a trespasser after a stop of the train, chose to pelt him with rocks and clods to make him get off the rods where he was riding, stealing a ride, under the car. The trespasser, in endeavoring to escape from under the car while it was running, fell, and was killed. It was within the course of the brakeman's employment to compel him to stop trespassing and leave the car, and, had he exercised the right in a proper and legal manner, there would have been no good cause to complain. The damage arose from the manner of the removal. It was unnecessarily violent, and illegal. The act of trespassing was not of itself contributory negligence justifying defendant's servant to resort to the acts he did, when there is not the least reason to infer that there was necessity to resort to any violence at all to remove the trespasser."

For actions against Carriers for Ejection of Passengers, from the earliest period to 1897, see vol. 8 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic, to date, are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS.

See NOTE ON LIABILITY OF CARRIERS FOR MISTAKES OF AGENTS IN RESPECT TO PASSENGERS' TICKETS, 7 AM. NEG. REP. 385–387.

than was necessary. To the special plea plaintiff replied generally that the defendant committed the said several trespasses of its own wrong. The trial resulted in a verdict in favor of plaintiff for one dollar, upon which the court rendered judgment, which judgment has been affirmed by the branch Appellate Court for the First District, and this appeal has been prosecuted to reverse such judgment of affirmance.

The evidence tends to establish that plaintiff boarded the Thirty-first street car of the defendant on the morning of the 27th of June, 1896, at Michigan avenue, for the purpose of going from her home to the Stock Exchange Building, located near the center of the business part of the city. She paid the conductor her fare, and requested of him a transfer over appellee's Wentworth Avenue Line. She received from him a transfer slip or ticket. At Wentworth avenue she left the Thirty-first street car, and boarded a Wentworth avenue car going north. To the conductor upon said car she tendered the transfer, but he refused to accept it on the ground that it did not entitle plaintiff to ride upon said line, the conductor upon the Thirty-first street line having by mistake given the plaintiff a wrong transfer slip. The plaintiff insisted that the conductor must accept the transfer she offered, refused to pay her fare, and declared that she would ride upon that transfer. The conductor insisted that she pay her fare or get off. Upon her declining to do so, he stopped the car, and ejected her. Whatever injury occurred to the plaintiff was occasioned at the time of her removal from the car. The court instructed the jury that it was the duty of the plaintiff to either pay her fare or leave the car upon the request of the conductor, and that, after her refusal so to do, if she sustained any injury in resisting ejection from the car, she could not recover for such injury, unless the evidence showed the conductor used more force than was reasonably necessary to put her off the car.

As we understand appellant's brief, it is substantially admitted that the jury were correctly instructed as to the law if the rule as announced by this court in the cases of C. B. & Q. R. R. Co. *v.* Griffin, 68 Ill. 499 (1); Pullman Palace Car Co. *v.* Reed, 75 Ill. 125 (2), and Penn. R. R. Co. *v.* Connell, 112 Ill. 295 (3), is to be

1. See abstract of the case of Chicago, B. & Q. R. R. Co. *v.* Griffin, 68 Ill. 499, in 8 Am. Neg. Cas. 171.

2. There is a note of Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, in 8 Am. Neg. Cas. 195.

3. See abstract of the case of Penn. R. R. Co. *v.* Connell, 112 Ill. 295, and subsequent decision, 127 Ill. 419, in 8 Am. Neg. Cas. 186.

adhered to and applied to street cars and passengers thereon. In the Griffin Case the plaintiff purchased a ticket at Mendota from that station to Earl, but the ticket agent inadvertently gave him one to Meriden, an intermediate station. Upon his refusal to pay his fare from Meriden to Earl, or peaceably leave the car, he was ejected. It was there said (page 504): "The law will not permit a passenger to interpose resistance to every trivial imposition to which he may really feel or imagine himself exposed by the employees that must be overcome by counter force in order to preserve subordination. It is due to good order and the comfort of the other passengers that he should submit for the time being, and redress his grievances, whatever they may be, by a civil action." In the Reed Case the plaintiff had purchased a ticket for a particular berth in a sleeping car, and had lost it after entering the car. He refused to pay a second time, and was forcibly expelled, after producing proof that he had purchased a ticket for a berth. It was held that the plaintiff was only entitled to recover the price paid for the ticket and reasonable compensation for the trouble and inconvenience he suffered by being deprived of a berth in the sleeping car. In the Connell Case the plaintiff, not having a proper ticket, and refusing either to pay his fare or peaceably leave the train upon the request of the conductor, was ejected. The court say (page 305): "We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton. When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare and in leaving the train on the command of the conductor, and, had he done so, he would have received no personal injuries, and might then have brought his action, and recovered, as before stated; but when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntarily brought upon himself. The conductor was ordered by his superior not to receive a ticket like the one presented. This order he was bound to obey, and, so far as appears, he acted in good faith, and when appellee was notified by the conductor that his ticket was not good, and would not be received, it was his duty to leave the train in a peaceable manner, and hold the company responsible for the

consequences, rather than resist, or undertake to retain his place on the train by force. A train crowded with passengers — often women and children — is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise, and dangerous to the traveling public, to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train, and seek redress in the courts, where he will find a complete remedy for every indignity offered and for all damages sustained." The doctrine announced in these cases is, in our opinion, sound; and, while cases may be found holding to the contrary, so far as we have been able to determine it is supported by the weight of authority. Pouilin *v.* Canadian Pac. R'y Co., 52 Fed. Rep. 197 (1); N. Y. L. E. & W. R'y Co. *v.* Bennett, 50 Fed. Rep. 496 (2); Bradshaw *v.* S. B. R. R. Co., 135 Mass. 407; Townsend *v.* N. Y. Cent., etc., R. R. Co., 56 N. Y. 295 (3); Downs *v.* N. Y. & N. H. R. R. Co , 36 Conn. 287 (4); McClure *v.* Phila. W. & B. R. Co., 34 Md. 532 (5); Petrie *v.* Penn. R. R. Co., 42 N. J. Law, 449; Shelton *v.* L. S. & M. S. R'y Co., 29 Ohio St. 214 (6); McKay *v.* Ohio River R. R. Co., 34 W. Va. 65 (7); Hufford *v.* Grand Rapids & Ind. R'y Co., 53 Mich. 118 (8); Van Dusan *v.* Grand Trunk R'y Co., 97 Mich. 439 (9); Yorton *v.* Milw. L. S. & W. R'y Co., 54 Wis. 234 (10); Woods *v.* Met. St. R'y Co., 48 Mo. App. 125 (11);

1. See abstract of the case of Pouilin *v.* Canadian Pac. R'y Co., 52 Fed. Rep. 197, in 8 Am. Neg. Cas. 704.

2. See abstract of the case of N. Y. L. E. & W. R. Co. *v.* Bennett, 50 Fed. Rep. 496, in 8 Am. Neg. Cas. 704.

3. Townsend *v.* N. Y. Cent., etc., R. Co., 56 N. Y. 295, is reported in 8 Am. Neg. Cas. 531.

4. Downs *v.* N. Y. & N. H. R. Co., 36 Conn. 287, is reported in 8 Am. Neg. Cas. 104.

5. There is a note of McClure *v.* Phila. W. & B. R. Co., 34 Md. 532, in 8 Am. Neg. Cas. 360.

6. A note of Shelton *v.* L. S. & M. S. R'y Co., 29 Ohio St. 214, appears in 8 Am. Neg. Cas. 572.

7. McKay *v.* Ohio River R. Co., 34 W. Va. 65, is reported in 8 Am. Neg. Cas. 662.

8. Hufford *v.* Grand Rapids & Ind. R'y Co., 53 Mich. 118, is reported in 8 Am. Neg. Cas. 430.

9. There is a note of Van Dusan *v.* Grand Trunk R'y Co., 97 Mich. 439, in 8 Am. Neg. Cas. 431.

10. Yorton *v.* Milw. L. S. & W. R'y Co., 54 Wis. 234, is reported in 8 Am. Neg. Cas. 678.

11. A note of Woods *v.* Met. St. R'y Co., 48 Mo. App. 125, appears in 8 Am. Neg. Cas. 487.

Percy *v.* Met. St. R'y Co., 58 Mo. App. 75 (1); Atch. Top. & S. F. R'y Co. *v.* Gants, 38 Kan. 618 (2); Peabody *v.* Oregon R'y & Navigation Co., 21 Ore. 121 (3).

We have no question that the rule announced in the foregoing cases applies with equal force to street railways and to passengers thereon. In Bradshaw *v.* Railway Co., *supra*, the plaintiff was a passenger upon one of the several street-car lines owned by defendant. Desiring to be transferred from one line to another, he asked for and received a transfer check, to which he was entitled by the rules of the company, but which, by mistake of the conductor, was for use upon a line other than the one over which he wished to go. He did not read it, but upon presenting it to the conductor of the line over which it should have read the conductor refused to receive it. and, as the plaintiff refused to pay fare, ejected him. The action was brought to recover damages for such ejection. In deciding the case the court say, on page 410: "It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract, but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way." When the conductor demanded that plaintiff pay her fare or leave the car, she would have been justified in refusing to pay and in leaving the car on the command of the conductor, and holding appellee responsible for the consequences; and, had she done so, instead of resisting the conductor, she would not have received the injuries complained of. We find no reversible error in this record.

The judgment of the Appellate Court will therefore be affirmed.

MAGRUDER, J.—I concur in the conclusion reached by this opinion, because the opinion follows precedents established by this court. The law is a science of precedents. But I do not concur in the statement of the opinion that "the doctrine announced in these

1. See note of Percy *v.* Met. St. R'y Co., 58 Mo. App. 75, in 8 Am. Neg. Cas. 487.

2. A note of Atch. Top. & S. F. R'y Co. *v.* Gants, 38 Kan. 608, appears in 8 Am. Neg. Cas. 274.

3. See note of Peabody *v.* Oregon R'y & Nav. Co., 21 Ore. 121, in 8 Am. Neg. Cas. 579.

cases is, in our opinion, sound." I bow to the law as announced by the authorities, but am not obliged to surrender my right of private judgment, and, in my opinion, the doctrine referred to is unsound, and an abhorrent subordination of the rights and convenience of passengers to the interests of railroad companies.

STANDARD OIL COMPANY v. EILER.

Court of Appeals, Kentucky, March, 1901.

MINOR EMPLOYEE INJURED BY MACHINERY — CONTRIBUTORY NEGLIGENCE — DUTY TO WARN EMPLOYEE OF DANGER. — In an action to recover damages for injuries sustained by plaintiff, a boy seventeen years of age, while in defendant's employ, it appeared that he was employed as a laborer in rolling barrels until the evening before the accident when he was sent by the foreman to help in carrying corn upstairs and put it into the hopper of a grinding machine, at the bottom of which machine the stuff that was ground came out at a certain spout about five inches long, attached to which spout was another spout, tied by a string to conduct the material to a hole in the floor. He was unskilled in the use of machinery. The machine became choked up in the spout, and to unchoke it plaintiff took off the other spout and ran his fingers in the metal spout to loosen the material, and in doing this the second time his hand was caught by the machine and crushed. *Held*, that as plaintiff had been uninstructed as to how to unclog the machine, it was a question for the jury whether he was guilty of contributory negligence under the circumstances. *Held*, also, that it was the duty of the foreman to have warned plaintiff of the danger, and to instruct him how to unclog the machine.

DIRECTING VERDICT — PEREMPTORY INSTRUCTION — CONTRIBUTORY NEGLIGENCE. — It is only where the proof of contributory negligence is clear that a peremptory instruction for defendant should be given.

APPEAL from Circuit Court, Jefferson County, Law and Equity Division.

Action by Andrew Eiler against the Standard Oil Company to recover damages for personal injuries. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

EDWARD P. HUMPHREY and HUMPHREY & DAVIE, for appellant.

THOS. LAWSON and ROBT. W. OWENS, for appellee.

HOBSON, J. — Appellee sued appellant to recover damages for personal injuries received, as he alleged, by reason of the negligence of appellant. The facts of the case, as shown by the proof for appellee, are substantially as follows: Appellee began work for appellant in July, 1898. He was seventeen years of age, and

unskilled in the use of machinery. He was employed to do work as a laborer by appellant in rolling barrels and the like until the evening before he was hurt. That evening he was sent by his foreman to help Johnson shovel corn. The next morning he was sent back to help Johnson again, and carried the corn upstairs, and put it in the hopper of the grinding machine. This machine was run by steam. It consisted of two burrs, the upper one revolving and the lower stationary. By looking in the hopper from the top, when not filled with grain, the burrs might be seen. At the bottom of the machine the stuff that was ground came out at a certain spout about five inches long. Appellant had attached to this spout a galvanized iron spout to conduct the material to a hole in the floor. The galvanized iron spout was tied to the other by a string. After they started the machine, Johnson went downstairs to fill the bags with the ground material as it came down, leaving appellee in charge of the machine. He instructed appellee that there were a few nails in the oats, which were mixed with the corn, and when a nail came through it would make a noise, and he should turn a crank, and let the nail go through. This was the only instruction given. When Johnson had been downstairs a few minutes, appellee came to him with his fingers crushed. The machine had choked up in the spout, and appellee, to unchoke it, took off the galvanized iron spout, and ran his fingers up in the metal spout to loosen the material in it. The second time he did this he put his fingers too far, and his hand was caught by the machine and crushed. The machinery could not be seen from the spout, and one could not tell how far it was from the mouth of the spout to the burr. The fact was that the burr revolved about two inches above the top of the spout, and there was a lug below this to throw the ground material out. The proof also shows that the machine was subject to choking in the spout, and that the proper way to unchoke it was to knock on the spout with something heavy, so as to jar it and unclog it. Johnson, who had been operating the machine, had a short time before run his finger up in the spout, and it had caught it and knocked off the nail. He says that he was just fooling when he did this, but he gave appellee no instruction as to how to unclog the machine, and did not tell him of the danger in unclogging the spout by putting his finger in it. The court below submitted the case to the jury under instructions which are not objected to, and seem to have been admirably clear and unobjectionable. The jury found a verdict for appellee. Substantially the only ground urged for reversal is that the court should have instructed the jury peremptorily to find for appellant. The learned counsel for appellant have referred us to a

number of authorities in support of this conclusion, but they are all cases of patent danger. In this state the rule is that, if there is any evidence, it must be submitted to the jury, and the general rule is in this class of cases that it is only where the proof is clear that a peremptory instruction should be given. Shear. & R. Neg., sec. 218. In view of the fact that the danger in this case was not patent, and that the machine was subject to clogging, we do not see that on the facts the court erred in submitting the question of contributory negligence to the jury. Appellee being a mere green laborer, put alone in charge of the machine, uninstructed as to how to unclog it, and ignorant that the burrs ran so close to the spout, it was a question for the jury whether a boy, situated as he was, in the exercise of such care as was to be reasonably expected of him, might or might not unloose the string and take off the galvanized iron attachment to relieve the choking, and whether or not, on finding the spout clogged up, he should, by the exercise of such care, have apprehended the danger of proceeding to unloose the obstruction in the spout with his finger. He was confronted with a difficulty which had not been explained to him, and what allowance should be made for his youth and inexperience a jury of twelve men were peculiarly fitted to determine. As has been well said: "Upon the facts proven in such cases, it is a matter of judgment and discretion — of sound inference — what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning, and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus concurring than can a single judge." Railroad Co. *v.* Stout, 17 Wall. 657. We think the proof fairly shows that the machine was subject to clogging, and the jury may have inferred that Johnson got his finger injured, not unlike appellee, in seeking to discover or

remove the cause of the trouble. Under such circumstances, it was incumbent on him, as the managing agent of appellant, when leaving a green boy in charge of the machine, to warn him of the danger, and instruct him how to unclog it.

Judgment affirmed.

AUCOIN v. CITY OF NEW ORLEANS ET AL.

Supreme Court, Louisiana, March, 1901.

PEDESTRIAN INJURED BY TRIPPING ON LOOSE PLANK ON SIDEWALK — LIABILITY OF CITY. — Where the duty to keep the sidewalks of streets in safe condition rests upon a municipal corporation, and this obligation is not met, is long neglected, and injuries resulting directly from the unsafe condition of the walk occur to a pedestrian, himself exercising ordinary care and caution, the corporation is answerable in damages (1). (Syllabus by the Court.)

APPEAL from Civil District Court, Parish of Orleans.

Action by Eugene Aucoin against the city of New Orleans. John Mitchell was cited in warranty by defendant. From a judgment for plaintiff, and a judgment dismissing the call in warranty, the defendant city appeals. *Judgment affirmed.*

SAMUEL L. GILMORE, City Attorney, and FRANK B. THOMAS, Assistant City Attorney, for appellant.

WILLIAM J. HENNESSEY, for appellee Aucoin.

CHARLES H. BROWNLEE, for appellee Mitchell.

BLANCHARD, J. — This action seeks to recover against defendant the sum of $10,000 for personal injuries sustained by plaintiff in consequence of a defective sidewalk on one of the streets of the city. The accident occurred on a night in December, 1898. It was dark, cold, and wet. Plaintiff was on his way home from a neighboring store. The sidewalk he was traversing was formed of planks. The evidence shows this walk was in very bad condition. The planks were decayed, loose, and out of place. Other persons had fallen there, in consequence, both before and after the accident which overtook the plaintiff. It appears that this bad condition of the sidewalk had existed for a long time prior to the accident. A year previous the city council had passed an ordinance looking to the paving of the same, and due publication thereof, as the

1. For similar accidents on Sidewalks, as in the case at bar, from 1897 to date, see vols. 1–9 AM. NEG. REP, and the current numbers of that series of Reports.

charter directs, had been made, but there the matter seems to have stopped. The paving was not laid, neither was the walk repaired. The plaintiff was tripped up by one of the loose planks, and fell into the gutter alongside. He sustained severe injuries. His ankle was broken — a compound, complicated fracture. The bone protruded through his shoe. He was in a helpless condition; unable to proceed; remained there until a passer-by discovered his plight, and, summoning assistance, carried him to his home. A physician was called in, who treated him for several weeks, when, under his advice, the patient was transferred to the Charity Hospital, where two operations were performed, and where he remained for months under treatment. He suffered much, and his injuries are shown to be of a permanent character. It is not made clear whether or not a street light was burning at the corner near by. But, if one was so burning, it was dim and flickering, and gave insufficient light to guide this pedestrian on his way. We find nothing in the record going to show that the plaintiff was not using ordinary care and circumspection. The answer of the city does not even charge him with negligence. It is merely a general denial of the averments of the petition, and the allegation that, if the complainant was injured, it was by reason of the neglect and refusal of John Mitchell, the owner of the property in front of which the accident occurred, to keep in good order and repair the banquette abutting on his premises, as was his duty to do. This John Mitchell is cited in warranty, with the prayer for such judgment in favor of the city over against him as may be rendered (if any) against the city in favor of the plaintiff. The warrantor pleaded the general issue and denied responsibility. There was judgment below in favor of the plaintiff for $2,000, with interest from judicial demand, and dismissing the call in warranty at the city's costs. The latter appeals. In this court the appellee moves for an increase of the amount of the judgment in his favor.

RULING. — The conclusion reached is that on both the facts and the law of the case the plaintiff is entitled to recover. The city of New Orleans is given by its charter full power and control of the streets and sidewalks. Under section 32 of the charter (Act No. 45 of 1896) the street commissioner has general charge of all matters relating to the streets, sidewalks, and pavements, and of the construction and repair of the same; and by section 15 the power is vested in the council to compel the owners of property to keep and maintain in good order and repair the sidewalks in front of their property. For the omission of its duty to keep this sidewalk in good and safe condition, or to compel the abutting owner to do so, the municipality rendered itself liable for resulting injuries, under

the circumstances as in this case shown. Turner *v.* City of Newburgh, 109 N. Y. 301, 307, 16 N. E. Rep. 344; O'Neill *v.* City of New Orleans, 30 La. Ann. 220; Cline *v.* Railroad Co., 41 La. Ann. 1031, 6 So. Rep. 851; Blume *v.* City of New Orleans (La.), 29 So. Rep. 106. The argument of defendant's counsel that plaintiff might have avoided the accident by taking another route to his home, and that if he had done so he probably would have escaped injury, etc., is, as to the case we are dealing with, well answered in O'Neill *v.* City of New Orleans, cited *supra.* The street was open for public travel, and it does not appear that plaintiff knew of its dangerous condition. Without such knowledge or notice, he had a right to assume it offered a safe passage. He was not in the habit of passing along that way. He used that walk only at infrequent periods. A person using a public highway is not bound to anticipate danger, without some notice of a condition of things suggesting a peril of travel. Turner *v.* City of Newburgh, 109 N. Y. 307, 16 N. E. Rep. 344.

With regard to the quantum of damages, we will not disturb the amount as fixed by the district judge.

With regard to the call in warranty, if there be legal liability to the city on the part of defendant cited in warranty, there is not a sufficiency of evidence in the record on this branch of the case to warrant passing upon the issue thus raised. But the city's rights as against John Mitchell, whatever they may be, are reserved. Blume *v.* City of New Orleans, *supra.*

For the reasons given, the judgment appealed from is affirmed.

KEEN v. MAYOR, ETC., OF CITY OF HAVRE DE GRACE.

Court of Appeals, Maryland, February, 1901.

DEFECTIVE SIDEWALK — KNOWLEDGE OF DEFECT — QUESTION FOR JURY — DIRECTING VERDICT. — In an action to recover damages for injuries sustained on a defective sidewalk, it appeared that plaintiff was walking along the sidewalk, on a dark night, and while so doing stepped into a hole, lost his balance and fell down an embankment. The defect had existed for two or three weeks and was in full view to passersby, but plaintiff had no knowledge of the defect. *Held*, that whether the city was negligent in not repairing the defect was a question for the jury, and direction of verdict for defendant was error (1).

1. For other actions against Municipal Corporations for Injuries Sustained on Sidewalks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

APPEAL from Circuit Court, Hartford County.

Action by Lycurgus Keen against the Mayor and City Council of the city of Havre de Grace. From a judgment in favor of defendant, plaintiff appeals. *Judgment reversed.*

Argued before MCSHERRY, Ch. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

JAS. J. ARCHER, FRED. R. WILLIAMS, and JOHN S. YOUNG, for appellant.

THOS. H. ROBINSON and P. L. HOPPER, for appellee.

PAGE, J. — The court instructed the jury at the close of the plaintiff's testimony that there was no evidence legally sufficient to establish negligence on the part of the defendant, and the correctness of this instruction constitutes the only subject of consideration in this case. The suit was brought to recover damages for injuries alleged to have resulted from the negligence of the defendant. The evidence shows that the plaintiff was walking along the sidewalk of Union avenue, in the city of Havre de Grace, an incorporated town, on a dark night, and while so doing fell into a hole and was injured. The immediate cause of his fall, the plaintiff claims, was the hole in the sidewalk, into which he stepped, whereby he lost his balance and fell down an embankment. The law applicable to a case of this kind is clear. It is not questioned that the city of Havre de Grace has power to grade and repair its streets and sidewalks (Act 1890, c. 180); and when such is the case the municipality is bound to maintain them in safe condition, and if it negligently fails so to do, and thereby persons, acting without negligence on their part, are injured, it is liable to respond in damages for all injuries caused by its neglect. Mayor, etc., *v.* Marriott, 9 Md. 160; Mayor, etc., *v.* Pendleton, 15 Md. 17. Before, however, the municipality can be made liable in any case, it must be shown that it had actual or constructive notice of the bad condition of the streets. As was well said in the case of Todd *v.* City of Troy, 61 N. Y. 509: "By 'constructive notice' is meant such notice as the law imputes from the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets, to see they are kept in a reasonably safe condition for public travel. They cannot fold their arms and shut their eyes, and say they have no notice. After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice, and charges it with negligence." If the effect be of such a character as not to be readily observable, express notice to

the municipality must be shown. Burns *v.* City of Bradford, 137 Pa. St. 367, 20 Atl. Rep. 997; Cook *v.* City of Anamosa, 66 Iowa, 430, 23 N. W. Rep. 907. But if it be one which the proper officers either had knowledge of, or by the exercise of reasonable care and diligence might have had knowledge of, in time to have remedied it, so as to prevent the injury complained of, then the municipality is liable. Stanton *v.* Salem, 145 Mass. 479, 14 N. E. Rep. 519; Gschwend *v.* Mellvale Borough, 159 Pa. St. 257, 28 Atl. Rep. 139; Mayor, etc. *v.* Perdue, 53 Ga. 607. If, therefore, the evidence in this case shows that there was a defect in the sidewalk, of which the city had knowledge, or by the exercise of reasonable diligence ought to have known, and the plaintiff, while exercising proper care, stepped into the hole, and was thereby injured, the municipality would be liable for such damages as ensued; further, that, if there is any evidence from which the jury can reasonably so find, the prayer we are now considering should not have been granted. The prayer is to the effect that there is no evidence in the case to establish negligence on the part of the defendant. Now, negligence is usually a question of fact for the jury. Lewis *v.* Railroad Co., 38 Md. 588. And it is only where the "facts are undisputed, or where only one reasonable inference can be drawn from them, that the question is one of law for the court." Baltimore & O. R. Co. *v.* State, 75 Md. 537, 24 Atl. Rep. 14. Moreover, a case could not be withdrawn from the jury if there be some reasonable evidence of the existence of facts requisite to fix liability upon the defendant. Baltimore & O. R. Co. *v.* State, 71 Md. 599, 18 Atl. Rep. 969. In view of this statement of the law, it follows that if there had gone to the jury evidence from which the jury could reasonably find that there was a dangerous hole in the sidewalk, of which the defendant had, or ought to have had, knowledge, and that such hole was the proximate cause of the accident, the prayer should not have been granted. Without discussing the evidence on these points, it is sufficient to state that divers witnesses testify to the existence and character of the hole. Mrs. Suter said she had seen it there for three weeks before the accident; George Carroll, that it had been there, "maybe, a couple of weeks or so;" and John Suter, "two or three weeks." There is further proof that the hole was in the bed of the sidewalk, and not hidden or obscured by anything from the full view of any one who passed along that part of the walk. There was also evidence that the plaintiff passing there on a dark night, without knowledge of the defect, stepped into the hole, and "was thrown backward" and fell into the gutter, and thereby was injured. If the jury believed this testimony, they would unquestionably be

justified in finding that the municipality was negligent in not repairing the defect if it, or its proper officers or agents, knew of its existence; and, if they did not have knowledge of its existence, then they did not exercise that active vigilance which was incumbent on them, to see that the sidewalk was kept in a reasonably safe condition for public travel. As this is the only question presented by the record, it follows that the judgment must be reversed, and the cause remanded.

Judgment reversed, with costs to the appellant, and new trial ordered.

JACOBS v. WEST END STREET RAILWAY COMPANY (TWO CASES).

Supreme Judicial Court, Massachusetts, March, 1901.

PASSENGER INJURED ALIGHTING FROM CROWDED STREET CAR — EVIDENCE — CARRIER NOT LIABLE. — In an action to recover damages for injuries sustained while alighting from a crowded street car, it appeared that plaintiff, who weighed over 200 pounds, fell as she was alighting by tripping over something on the rear platform of the car, the crowded condition of the platform preventing her from using the iron rail at the rear of the car to steady herself as she was getting off; and that the conductor, who was in the middle of the car did not assist her. There was no evidence that plaintiff was jostled by anybody. *Held*, that there was no evidence that defendant was negligent (1).

Held, also, that evidence that the cloth to which a button was sewed on the jacket worn by plaintiff's companion, who got off the car just before plaintiff fell, was torn from the adjoining cloth as she was pushing her way through the crowd, and by reason of the crowd, was rightly excluded, the same being too remote and involving collateral issues.

EXCEPTIONS from Superior Court, Suffolk County.

Action by Miriam Jacobs against the West End Street-Railway Company and by Isaac Jacobs against the same. From a judgment in favor of defendant in each case, plaintiffs bring exceptions. *Exceptions overruled.*

1. For actions relating to Alighting from or Boarding Street Cars, Trains, etc., see vols. 2–7 Am. Neg. Cas., where the same are chronologically grouped, from the earliest period to 1897, and arranged in alphabetical order of States. Subsequent actions on the same topic, to date, are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

See also cases relating to Persons Injured on Platforms of Cars, in vols. 9 and 10 Am. Neg. Cas., and vols. 1–9 AM. NEG. REP.

WINTHROP H. WADE and JOHN M. MERRIAM, for plaintiffs.

M. F. DICKINSON and WALTER BATES FARR, for defendant.

LORING, J. — This is an exceedingly close case. On the one hand, as street cars are run, it is not negligent to take on passengers when all the seats are occupied, when there is no more standing room in the passageway of the car, and the new passengers have to stand on the platforms, and even on the steps. Meesel *v.* Lynn & Boston R. R. Co., 8 Allen, 234 (1). Furthermore, a passenger takes the risks incident to the mode of travel he chooses to adopt; as, for example, the risk of being injured in the removal of an objectionable passenger from a crowded car. Spade *v.* Lynn & Boston R. R. Co., 172 Mass. 488, 5 Am. Neg. Rep. 367, 52 N. E. Rep. 747 (2). On the other hand, it has been held that a street-railway company may be held liable for negligence if it allows its car to be so crowded with passengers that one of them is crowded off a platform while the car is proceeding on its way. Lehr *v.* Steinway & H. P. R. Co., 118 N. Y. 556, 23 N. E. Rep. 889 (3); Reem *v.* St. Paul City R. R. Co., 77 Minn. 503, 6 Am. Neg. Rep. 588, 80 N. W. Rep. 638, 778; Pray *v.* Omaha St. R'y Co., 44 Neb. 167, 62 N. W. Rep. 447 (4). It has also been held that the duty which a street railway owes to its passengers is not terminated until the passenger has alighted from the car, and covers the time during which the passenger is getting off. And, lastly, it may be that, if an aged woman passenger is pushed off the step by the turbulent behavior of the crowd behind her while she is alighting from the front platform under the very eyes of the motorman, there is evidence of negligence for the jury, Hansen *v.* Railway Co. (N. J. Err. & App.), 8 Am. Neg. Rep. 276, 46 Atl. Rep. 718; and so, also, when the passenger is jostled by incoming passengers, as in Buck *v.* Manhattan R'y Co., 15 Daly, 48, 2 N. Y. Supp. 718; Id., 15 Daly, 276, 6 N. Y. Supp. 524; Id., 15 Daly, 550, 10 N. Y. Supp. 107 (5). See,

1. Meesel *v.* Lynn & Boston R. R. Co., 8 Allen, 234, is reported in 9 Am. Neg. Cas. 446.

2. See also former decision in the Spade Case, reported in 168 Mass. 285, 2 Am. Neg. Rep. 566.

3. Lehr *v.* Steinway & H. P. R. R. Co., 118 N. Y. 556, is reported in 9 Am. Neg. Cas. 635.

4. Pray *v.* Omaha St. R'y Co., 44 Neb. 167, is reported in 9 Am. Neg. Cas. 549.

5. See the various phases of the litigation in Buck *v.* Manhattan R'y Co., in the New York Court of Common Pleas, conveniently reported in 5 Am. Neg. Cas. 745-755. There was a third trial of the Buck Case, at which defendant seems to have recovered a verdict, which was affirmed by the General Term, and by the Court of Appeals without an opinion. See 134 N. Y. 589.

in this connection, Treat *v.* Boston & Lowell R. R. Co., 131 Mass. 371, 373 (1), where the presence of an excessive crowd on a train on a steam railroad is considered in a case where the train never came to a full stop at the station at which the plaintiff had a right to get off. In the case at bar there was no evidence that the injury which the plaintiff in the first case suffered was caused by any defect in the platform, but it appeared that it was caused by the plaintiff's tripping over "something" while she was on the rear platform on her way to the street. There was evidence that the crowd on the platform made it "impossible for the plaintiff to get at and use the iron rail at the rear of the car" to steady herself as she was getting off; and it appeared "that the conductor was inside of the car" — "in the middle of the car" — while the plaintiff was alighting. It may be conceded in this case that it is the duty of a conductor who is on the rear platform when a passenger is alighting to see to it that the passenger has an opportunity to alight with safety, and that it is his duty to see to it that passengers who are blocking the exit shall stand aside, or even alight from the car temporarily. Passengers who choose to take passage on a car which is so crowded that they have to stand on the rear platform or on the steps, and who thereby block the exit from the car, assume all inconveniences incident thereto, including that of temporarily alighting, when necessary, to allow a proper exit for passengers who wish to get off. It also may be conceded that the conductor's duty requires him, when not otherwise engaged, to be on the rear platform. But a conductor has duties to perform which take him away from the rear platform, and, the greater the number of passengers, the longer the time during which it is necessary for him to be absent, and properly absent, from it. The duty of collecting tickets, for example, being one which cannot always be postponed, is a duty which, in a crowded car requires the conductor to be absent from the platform a good deal, and for some length of time; and, if a passenger wishes to alight while the conductor is so engaged, the inconvenience which she may endure in having to alight without his aid is one of those inconveniences which the passenger assumes by choosing to travel on a street car at a time of day when it is notorious that such conveyances are crowded. There is no evidence in the case at bar that this conductor was negligent in being absent from the rear platform when the plaintiff was alighting. Unless the plaintiff is entitled to go to the jury on the ground that the company should provide some one in addition to the conductor and motorman to care for the car

1. Treat *v.* Boston & Lowell R. R. Co., 131 Mass. 371, is reported in 3 Am. Neg. Cas. 799.

and its passengers, there was no evidence of negligence in this case. As street cars are run, we do not think that the omission to employ a third person could be found to be negligence. The fact that the place where the plaintiff was getting off is a place where passengers are transferred to other lines makes no difference. No distinction can be drawn between the duties devolving upon a street-railway company when stopping at such a place for passengers to alight and those which they have when they stop at other places. Neither does the fact that the plaintiff weighed over 200 pounds make a difference. The mere fact that a woman weighs over 200 pounds cannot make it the duty of the conductor to drop all other duties, and help her get off. Neither is it material that there was evidence that there were passengers "trying to get on as the passengers were alighting from the car," and "that there was a scuffle; a regular scuffle." There was no evidence that the plaintiff was jostled by anybody. It appeared that the injury was caused by her tripping over something. For these reasons we are of opinion that there was no evidence on which the jury could find that the defendant was negligent.

We are also of opinion that the plaintiff's exceptions to the exclusion of evidence must be overruled. The fact that the cloth to which a button was sewed on the jacket worn by the companion of the plaintiff, who got off the car just before the plaintiff fell in attempting to do so, was torn from the adjoining cloth as she was pushing her way through the crowd, and by reason of the crowd, was rightly excluded. It is plain that the evidence could have been properly excluded as evidence involving collateral issues, and as too remote. Collins *v.* Inhabitans of Dorchester, 6 Cush. 396; Dean *v.* Murphy, 169 Mass. 413, 48 N. E. Rep. 283.

Exceptions overruled.

HUDSON v. LYNN AND BOSTON RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, February, 1901.

EJECTING INTOXICATED PASSENGER FROM STREET CAR — DANGEROUS PLACE — CARE REQUIRED OF CARRIER. — In an action to recover damages for the death of a person who was killed by one of defendant's street cars after he had been ejected from another car, it appeared that deceased, who was intoxicated, fell asleep on the car, and the conductor, after several efforts, failing to wake him to collect his fare, put him off the car, on a dark and rainy night, in an unlighted part of the road, where cars and teams were passing in each direction, and that about half

an hour after he had been put off the car, the deceased was run over and killed by another car. *Held*, that the manner of ejection was not the due and proper care required of defendant in the exercise of its right to eject a passenger whose conduct was improper, or who had not paid his fare on demand (1).

INTOXICATED PASSENGER — RIGHT TO EJECT FROM STREET CAR. — Where the conduct of a passenger on a street car is such as to justify an inference that it is due to intoxication, leading to an apprehension that it might result in rudeness or disturbance, the conductor may eject him from the car in order to prevent such apprehended misconduct on the passenger's part.

FAILURE TO PAY FARE ON DEMAND — RIGHT TO EJECT — STATUTE. — The law regulating the rights of passengers upon street railways (Pub. St., c. 112, sec. 197) providing that "whosoever does not upon demand first pay such toll or fare shall not be entitled to be transported for any distance, and may be ejected from a street-railway car," governs wherever the railway may be located.

EXCEPTIONS from Superior Court, Essex County.

Action by Levi Hudson, administrator of Joseph P. Pope, deceased, against the Lynn and Boston Railroad Company. Verdict was directed for defendant. Plaintiff excepts. *Exceptions sustained.*

FRANK D. ALLEN, for plaintiff.

HENRY F. HURLBURT, for defendant.

BARKER, J. — The evidence tended to show that on the night of September 7, 1898, Pope, the plaintiff's intestate, took one of the defendant's out-bound electric cars, in the Boston subway, paid a single fare, saying, as he paid, "When I pay my next fare I shall want a transfer to Upper Swampscot Line," and was carried as a passenger towards Lynn. His second fare became payable as the car was passing over the Lynn marshes. Shortly after paying the first fare, he began to act in a manner which would justify the conclusion that he was intoxicated, and before the car reached the point where the second fare was to be paid he was in a sleep of stupor, which the conductor had made several ineffectual attempts to break. When the conductor came in to collect the second fares, Pope was sitting up asleep. The conductor first took the fares of the other passengers; then came to Pope, and shook him several times, and tried to wake him up, but he made no response. After this shaking had continued for some time, and Pope did not awaken, the conductor stopped the car, and the motorman came in, and asked

1. For actions relating to Ejection of Passengers from Street Cars, Trains, etc., from the earliest period to 1897, see vol. 8 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic, to date, appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

what the matter was. The conductor replied: "No matter what he is doing, we will put him off here in the mud; the next time he will know about paying his fare." They then lifted him, carried him out of the car, left him in the road, and the car went on its way. The night was dark and rainy. The road in which he was left was not lighted, and was occupied in part by the defendant's track, over which its cars were passing in each direction at intervals of fifteen minutes. Teams were accustomed to use the road at night. There were no sidewalks. The road was through the Lynn marshes, and there were no dwellings or other buildings or any shelter in the vicinity. Further along towards Lynn, three minutes run of the car distant, were dwellings and shelter. About half an hour after Pope had been so taken from the car he was on the ground upon the railroad track, and was run over and killed by another car of the defendant, going towards Boston. There was testimony from the motorman of the car which followed that from which Pope was ejected that when this next car passed the locality where Pope had been left the motorman saw a man standing alone against the fence, between it and the track, about fifteen minutes after Pope had been ejected. There was no other testimony on the subject of how Pope came to be on the ground on the track when struck by the car. The action is brought by his administrator, and the declaration has counts, under St. 1886, c. 140, to recover for loss of life, and also a count at common law for an assault alleged to have been committed in ejecting him from the car. Upon the evidence introduced by the plaintiff, a general verdict for the defendant was ordered, which must be set aside if any of the counts should have been submitted to the jury.

We are of opinion that Pope ceased to be a passenger when ejected from the car. Two things had occurred to give the defendant a right to terminate his relation as a passenger. The first was his conduct, which, whether in fact due to intoxication, to the effect of a drug, or to illness from some other cause, was such as to justify an inference that it was due to intoxication, and to found a just apprehension that unless he should be ejected it might result in acts of impropriety, rudeness, or disturbance on his part. The conductor was not bound to wait until some act of this kind had been committed, but could expel the passenger in order to prevent such misconduct as was to be apprehended from a person in his apparent condition. Vinton *v.* Middlesex R. R. Co., 11 Allen, 304 (1); Murphy *v.* Union R'y Co., 118 Mass. 228 (2).

1. Vinton *v.* Middlesex R. R. Co., 11 Allen, 304, is reported in 8 Am. Neg. Cas. 369.

2. Murphy *v.* Union R'y Co., 118 Mass. 228, is reported in 8 Am. Neg. Cas. 405.

The other circumstance which gave the defendant a right to eject him was the fact that he had not, upon demand, paid the fare for that part of his journey then being made. The law regulating the rights of passengers upon street railways in this respect is contained in the following clause of Pub. St., c. 112, sec. 197: "Whosoever does not upon demand first pay such toll or fare shall not be entitled to be transported for any distance, and may be ejected from a street railway car." No doubt this was enacted before the introduction of electric cars, and when most street cars ran on streets where it would be safe to leave a passenger at any time. But the provision remains unchanged, and governs wherever the railway may be located. Therefore, by the terms of the statute, Pope having not paid his fare upon demand, he was not thereafter entitled to be transported for any distance, and might be ejected from the car. This having been done, even if in an improper manner, his status as a passenger was terminated, although he may have had a right of action for his damages, if the ejection was effected in a wrong manner.

It was not the due and proper care required of the defendant in the exercise of its right to eject a passenger whose conduct was improper, or who had not paid his fare upon demand. See Lovett *v.* Salem & S. D. R. R. Co., 9 Allen, 557 (1); Murphy *v.* Union R'y Co., 118 Mass. 228 (2). In the opinion of a majority of the court, this requires us to sustain the exceptions, and to send the case back for a new trial. As the evidence may then be different, we do not feel called upon to express an opinion upon the question whether the statutory action can be supported upon the evidence stated in the present bill of exceptions.

Exceptions sustained.

BOSTON WOVEN-HOSE AND RUBBER COMPANY v. KENDALL.

Supreme Judicial Court, Massachusetts, March, 1901.

RIGHT OF INDEMNITY FOR LIABILITY ENTAILED BY NEGLIGENCE OF MAKER OF BOILER — WARRANTY. — In an action to recover damages which plaintiff had to pay to its employees for personal injuries caused

1. Lovett *v.* Salem & South Danvers R. R. Co., 9 Allen, 557, is reported in 3 Am. Neg. Cas. 754.

2. Reported in 8 Am. Neg. Cas. 405.

by an explosion of a boiler made by defendants, it appeared that defendants undertook to make for plaintiff a boiler which would stand a working pressure of one hundred pounds, it being understood between the parties that the boiler was to be used to contain naphtha vapor for certain experiments. An experiment was tried, and at a pressure of less than one hundred pounds the naphtha vapor in the boiler escaped, and caused the damage for which plaintiff had to pay. According to plaintiff's evidence the accident was due to an improper construction of the hinge on the door of the boiler. *Held*, that although plaintiff's misconduct in failing to discover by inspection the defect in an article specially made for it rendered it liable for damages for injuries to its employees, it was entitled to recover over against defendants, reliance having been placed upon defendant's judgment in a matter as to which defendants were experts (1).

EXCEPTIONS from Superior Court, Middlesex County.

Action by the Boston Woven-Hose and Rubber Company against one Kendall. From judgment for plaintiff, defendant excepts. *Exceptions overruled.*

1. In commenting upon the case at bar, the New York Law Journal, in an editorial in a recent issue, April, 1901, entitled "Right of Indemnity against Co-Delinquent for Liability Entailed by His Negligence," after stating the facts and quoting a part of the opinion of HOLMES, Ch. J., said: "In City of Brooklyn *v.* Brooklyn City R. R. Co., 47 N. Y. 475, wherein are cited several Massachusetts cases as authority for the decision rendered, the opinion concludes with the following language: 'Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damages paid by reason of the offense in which both were concerned in different degrees as perpetrators.' This broad statement, if taken literally, might sanction the administration, as between co delinquents, of the doctrine of 'comparative negligence.' As far as we can see, there would be as grave objection to the recognition of such doctrine in cases of this class as in actions brought by a party injured against the person responsible for his injury (see Shearman and Redfield on Negligence, sec. 31). Doubtless the New York Court of Appeals did not intend the proposition above quoted to be taken without qualification. The courts of Massachusetts have decided many cases on the general subject, and a comparison, for example, between the two decisions of the Supreme Judicial Court in the case of Churchill *v.* Holt (reported respectively in 127 Mass. 165, and 131 Mass. 67), will throw considerable light on the *status* of co-delinquents *inter se*. It may be said generally that a right of indemnity over is recognized in favor of a delinquent who has not been personally in fault against one who has been personally in fault. This includes cases where, because of duty to the public or by reason of the principle of *respondeat superior*, a personally blameless individual has been rendered liable for the damage occasioned by another's fault.

"In Nashua Iron & Steel Co. *v.* Worcester & N. R. Co., 62 N. H. 159, a somewhat broader rule is laid down, as follows (syllabus): 'A plaintiff who by reason of his and the defendant's negligence has been compelled to pay damages to another may recover indemnity, although but for his own negligence the injury would not have happened, if at the time it occurred he

CONRAD RENO, for plaintiff.

ALFRED HEMENWAY and H. S. MCPHERSON, for defendant.

HOLMES, Ch. J. — This is an action to recover damages which the plaintiff had to pay to its employees for personal injuries caused by an explosion of a boiler made by the defendants. The facts may be stated in a few words. The defendants, who were first-class boiler makers, undertook to make for the plaintiff a boiler which would stand a working pressure of one hundred pounds, and, on the plaintiff's testimony, understood that the boiler was to be used to contain naphtha vapor for experiments in devulcanizing india-rubber. An experiment was tried, and, at a pressure of less than one hundred pounds, the naphtha vapor blew out the packing between the door and the end of the boiler by the side of the hinge, escaped into the air, ignited and caused the damage for which the plaintiff had to pay. According to the plaintiff's evidence the accident was due to an improper construction of the hinge, which, by not having play enough, prevented that part of the door which was nearest to it from being pressed close to the boiler end by clamps which were used for that purpose.

could not, and the defendant could, have prevented it by ordinary care.'

"In Gray *v.* Boston Gaslight Co., 114 Mass. 149, the court said: 'When two parties acting together commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or *particeps criminis*, and the damage results from their joint offense. This rule does not apply when one does the act, or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in *pari delicto* as to each other, though, as to third persons, either may be held liable.' The limitation of the doctrine in Massachusetts is suggested by the second Churchill *v.* Holt decision (131 Mass. 67), where it was held that 'if a person leaves a hatchway in the sidewalk connected with his premises in an unsafe condition, so that an injury to a traveler on the street is liable to happen in consequence of it, and another person so interferes with the hatchway as to cause it to be more dangerous, and a traveler is injured by the hatchway, the occupant of the premises is in *pari delicto* with the other person, and cannot recover indemnity of him if compelled to pay damages recovered in an action by the injured person.'

"According to the actual facts involved in the various cases passed upon by our own courts, the New York decisions apparently are harmonious in principle with those of Massachusetts. (See Brooklyn *v.* Brooklyn City R. R. Co., *supra;* Oceanic Steam Nav. Co. *v* Compania Trans. Esp., 134 N. Y. 461. and cases cited.) The recent Massachusetts case first above cited, as Chief Justice Holmes shows, is substantially in accord with the previous authorities. The court construes a warranty of quality and condition on the part of the defendant as sufficient to authorize the plaintiff to use the article in question without test or examination, and, under such circumstances, the plaintiff is held, as between the parties, to be without fault."

At the trial the defendants asked many rulings and took many exceptions, but in the main they are condensed by the present argument into the general proposition that inasmuch as the plaintiff could not have been compelled to pay its workmen except on the ground that it had been wanting in due care, it cannot hold the defendants answerable for what would not have happened if the plaintiff had done its duty. The case is treated by the defendants' counsel as if it stood on the same footing as one where a plaintiff seeks to recover for personal injuries to himself to which his own negligence has contributed. But the judge allowed the plaintiff to recover a verdict on proving as it did to the satisfaction of the jury that it was liable for the damages which it paid, and also that although negligent as towards its servants it had shown all the care which the defendants had a right to expect.

We are fully aware of the difficulties in the way of holding a person liable for damage when the tort of another has intervened between his act and the result complained of. Glynn *v.* Railroad Co., 175 Mass. 510, 511, 56 N. E. Rep. 698, and cases cited. Nevertheless it is held by our decisions that in some cases of that sort there may be a recovery, and this seems to be recognized in the case upon which the defendants chiefly rely. Nashua Iron and Steel Co. *v.* Worcester & N. R. Co., 62 N. H. 159. The defendants to bring themselves within the distinctions there taken, insist that we must assume that the plaintiff here might have prevented the accident by ordinary care, because it must have been held liable on the ground of a want of such care, and that, in such a case at least, it cannot make the defendants indemnify it.

We are of opinion that the plaintiff is entitled to hold its verdict, and that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it and probably not falling within the exceptional rule as to well known articles made by reputable makers and sold in the market ready for use. Shea *v.* Wellington, 163 Mass. 364, 369, 40 N. E. Rep. 173. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty of representations of the defendants. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendants' judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether

the false warranty be called a tort or a breach of contract the consequence which ensued must be taken to have been contemplated and was not too remote.

The fact that the reliance was not justified as towards the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good. See St. 1894, c. 522, sec. 29. The New Hampshire decision is not against it, and there is an English case which went to the Court of Appeals which is very much in point. Mowbray *v.* Merryweather [1895] 1 Q. B. Div. 857; [1895] 2 Q. B. Div. 640 (1). It is intimated in that case that the workman himself could have recovered in the first place against the defendant. Whether that is a necessary condition of a recovery over we need not consider. See City of Holyoke *v.* Hadley Water-Power Co., 174 Mass. 424, 428, 54 N. E. Rep. 889; Lasting-Mach. Co. *v.* Bradley, 171 Mass. 127, 134, 50 N. E. Rep. 464. There are many cases in our own and other reports which offer as strong or stronger applications of the principle of liability over. Gray *v.* Gaslight Co., 114 Mass. 149; Churchill *v.* Holt, 127 Mass. 165, 131 Mass. 67; Railroad Co. *v.* Slavens, 148 Mass. 363, 19 N. E. Rep. 372; City of Holyoke *v.* Hadley Water-Power Co., 174 Mass. 424, 54 N. E. Rep. 889; Washington Gaslight Co. *v.* District of Columbia, 161 U. S.

1. In Mowbray *v.* Merryweather, L. R. 1 Q. B. Div. 857 (1895), it appeared that plaintiffs, a firm of stevedores, contracted to discharge a cargo from defendant's ship, defendant agreeing to supply all necessary and proper cranes, chains, etc., reasonably fit for the purpose of discharging the cargo. Defendant in breach of his agreement supplied a defective chain which broke while being used, whereby one of plaintiff's workmen was injured. The defect in the chain might have been discovered by plaintiffs by the exercise of reasonable care. The workman brought an action under the Employers' Liability Act, 1880 (43 and 44 Vict., c. 42), against plaintiffs, who admitted their liability and paid him £125, which sum they sought to recover from defendant. Held, that the injury to plaintiff's workman was the natural consequence of defendant's breach of contract; that, as between plaintiffs and defendant, the plaintiffs were entitled to rely on defendant's warranty; and that, plaintiffs being liable to their workman for the injury he had sustained, the money which they had paid to settle his action was recoverable by them from the defendant as damages for his breach of contract. Judgment for plaintiffs for £125 with costs. Opinion by Charles, J.

On an appeal from the judgment for plaintiffs rendered by Charles, J., in Mowbray *v.* Merryweather (*supra*), the appeal was dismissed. Lord Esher, M. R., rendering judgment, and Kay, L. J., and Rigby, L. J., concurring in same in separate opinions. It was held that on the facts (as stated in preceding paragraph), the damages claimed were not too remote. See L. R. 2 Q. B. Div. 640 (1895).

316, 327, 328, 16 Sup. Ct. Rep. 564; Oceanic Steam Nav. Co. *v.* Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. Rep. 987.

Two exceptions were taken to the admission of evidence. The first was to the admission of a patent for a process of devulcanizing india-rubber by hot naphtha vapor under pressure, granted to Dr. Clark, for whose experiments the boiler was ordered. This laid a foundation for Clark's testimony that he notified the defendants of the use for which the boiler was wanted. The other exception was to letting in testimony that experiments two or three months later with a similar machine, and with all conditions similar except the hinge, did not result in an explosion. Evidence to the same point already had been let in before the exception was taken, and even if an exception properly were open we should hesitate to sustain it, considering that the result in some degree tended to confirm the theory that the construction of the hinge caused the trouble.

Exceptions overruled.

DE FORGE v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, February, 1901.

BRAKEMAN INJURED — NOTICE OF INJURY — STATUTE. — Where a brakeman of defendant was injured and notice of injury was given to defendant's freight agent who sent it to defendant's attorney, in pursuance of printed directions, who had received such notices for five years, no objection to the receipt of such notices in such way having been made, it was held that such notice was in accordance with St. 1887, c. 270, § 3, requiring notice of injury to employees to be 'given to the employer."

PERSONAL INJURY — EVIDENCE — X-RAY PICTURES. — Where a brakeman in the employ of defendant was injured, and the principal inquiry was as to the extent of the injury, his left foot being injured, plaintiff put in evidence X-ray pictures of his two feet, printed from a glass plate, each picture being marked "left" and "right," in lead pencil, and a witness testified that there had been a dislocation of the bones upward, and that an enlargement of the bone of the foot marked "left" was the result of fracture, and on cross-examination, testified that, leaving the pictures out, there was nothing to the eye to disclose any fractures. Defendant offered to show that the X-ray placed the right foot upon the right side of the plate, and the left foot upon the left side of the plate and that in printing sensitized paper the objects would be reversed; and that, as a matter of fact, the pictures showing an enlargement were pictures of the right foot instead of the left. Defendant had offered the glass plate from which plaintiff's

pictures were taken, and other pictures printed from the same plate were offered. *Held*, that defendant's evidence was improperly excluded.

ADMISSION OF PICTURES IN EVIDENCE — DISCRETION OF COURT. — Discretion of the court in admitting in evidence plans or pictures is limited to the matter of verification or authentication of such plans or pictures.

X-RAY PICTURES — VERIFICATION. — Where plaintiff had put in evidence two X-ray pictures printed from a glass plate, and defendant offered the plate, together with two other pictures made from the same plate, and plaintiff's photographer testified that he did not know much about the X-ray, while the person who took the pictures for defendant was a physician of high standing, who testified that he had taken in the neighborhood of a hundred X-ray pictures, and had seen a majority of them developed, it was held that neither the plate nor the pictures offered in evidence by defendant could be excluded on the ground that they were not duly verified.

EXCEPTIONS from Superior Court, Hampden County.

Action for personal injuries by Alfred De Forge against the New York, New Haven and Hartford Railroad. There was a judgment for plaintiff, and defendant brings exceptions. *Exceptions sustained.*

J. B. CARROLL and W. M. MCCLINTOCK, for plaintiff.

WALTER S. ROBINSON, for defendant.

LATHROP, J. — The first question in this case is whether the notice required by St. 1887, c. 270, sec. 3, was given to the defendant. The statute requires that it is to be "given to the employer." The person to whom the notice was given was the freight agent of the defendant in Springfield. He testified that he sent it to William E. Barnett, the attorney for the defendant in New Haven; that he so sent it in pursuance of general printed instructions directing him to send such notices as pertained to Barnett's department, and that he had received such notices for five years. We do not think it necessary to determine whether it would have been enough to show merely a notice given to a freight agent or to an attorney of the defendant, but when it appeared that the practice of giving notices in this way had been going on for so long a time without, so far as appears, any objection being made, it might well be found that the defendant had recognized and acquiesced in the practice. See McCabe *v.* City of Cambridge, 134 Mass. 484; Shea *v.* N. Y., N. H. & H. R. R. Co., 173 Mass. 177, 6 Am. Neg. Rep. 82, 53 N. E. Rep. 396. This exception is therefore overruled.

The remaining question relates to the exclusion of evidence offered by the defendant. As a result of the accident the plaintiff's left foot was injured, and the principal inquiry at the trial was as to the extent of the injury. The plaintiff put in evidence X-ray pictures of the plaintiff's two feet, printed from a glass plate. Each of the pictures was marked under the toes of each foot "left" and "right,"

respectively, both words being in lead pencil. One of the plaintiff's witnesses explained that the representation of the foot with the word "left" below it was the left foot, and represented the injured foot; and the other, marked "right," was the right foot. He then testified that there had been a dislocation of the bones upward, and that an enlargement of the bone of the foot marked "left" in the picture was, in his opinion, the result of fracture, and that the man would always have a weak foot, and would not be able to perform the duties of a freight brakeman. On cross-examination he testified that, leaving out the question of fracture, there was no reason why the plaintiff could not have a perfectly useful foot; and that, leaving the pictures out, there was nothing to the eye to disclose any fractures, although he had suspicions as to a fracture. The defendant contended, and offered to show, that the X-ray placed the right foot upon the right side of the plate, and the left foot upon the left side of the plate, and that in printing sensitized paper the objects would be reversed; and that, as matter of fact, the pictures showing an enlargement were pictures of the right foot, instead of the left. This evidence was excluded. Immediately before this the defendant had offered the glass plate from which the plaintiff's pictures were taken, and this was excluded. Subsequently other pictures printed from the same plate were offered in evidence, and were excluded. No reason appears in the exceptions why the evidence offered by the defendant was excluded, and we can see no reason why the plate from which the pictures put in evidence by the plaintiff were printed should not have been admitted. It was produced by the photographer who made the pictures. The ground urged by the plaintiff against its admission was that it had on it the letters "R" and "L," which had been put on since the pictures put in evidence by the plaintiff had been printed. These letters did not in any way obscure the portion of the left foot in controversy, and were certainly no more objectionable than the letters added in pencil to the plaintiff's pictures.

It is further contended by the plaintiff that there was some doubt as to the manner in which the plate was made, and that the judge might have excluded it for that reason. We see nothing in the exceptions to substantiate this claim. If it were true, then the plaintiff's pictures should not have been admitted. It is entirely clear from the testimony that the picture on the glass plate was not taken by a lens, but by an X-ray machine; and that it was the impression of a shadow, not a reflection of an object; the plate being below the feet, and the light above them. When pictures were printed from the plate, the position of the feet would be reversed;

and this would have been demonstrated had the plate and the pictures taken by the defendant been admitted. The plaintiff assumed from his marking on the pictures admitted that the feet as represented on the plate were reversed, which is not in accordance with the testimony given by his own witnesses as to the manner in which the impressions on the plate were produced.

Lastly, it is asserted that the judge might have excluded, in his discretion, the plate and the pictures offered by the defendant. The rule is thus stated by Chief Justice Gray in Blair *v.* Pelham, 118 Mass. 420: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception." It is, therefore, in the matter of verification or authentication that the judge has discretion. But here there was no question of this sort. The plaintiff had put in two pictures printed from the glass plate. The defendant then offered the plate, together with two other pictures made from the same plate; and the evidence of verification was stronger in the case of the defendant's pictures than in the case of the plaintiff's. The photographer who took the plaintiff's pictures testified that he did not know much about the X-ray; while the person who took the pictures for the defendant was a physician of high standing, who had taken, as he testified, in the neighborhood of a hundred X-ray pictures, and had seen the majority of them developed. On this evidence we do not deem it possible that the judge could have excluded the plate or the pictures on the ground that they were not duly verified. While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken. Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. Rep. 445. The rule laid down by Chief Justice Gray in Blair *v.* Pelham is in accordance with earlier and later cases in our reports. Hollenbeck *v.* Rowley, 8 Allen, 473; Marcy *v.* Barnes, 16 Gray, 161, 163; Randall *v.* Chase, 133 Mass. 210, 213; Turner *v.* Railroad Co., 158 Mass. 261, 265, 33 N. E. Rep. 520; Com. *v.* Morgan, 159 Mass. 375, 34 N. E. Rep. 458; Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. Rep. 783; Van Houten *v.* Morse, 162 Mass. 414, 422, 38 N. E. Rep. 705. It is true that the opinion in Gilbert *v.* Railway Co., 160 Mass. 403, 36 N. E. Rep. 60, after stating many reasons why the photograph offered in evidence in that case was properly rejected, concludes in these words, "We think, at least, it was in the discretion of the

court to reject it;" citing Farrell *v.* Weitz, *ubi supra.* But the case cited was not decided on the ground that the judge had discretion except on the matter of verification, and we do not think that the court intended to lay down a broader rule than that stated in Blair *v.* Pelham. It is also true that in some cases a somewhat broader rule is laid down. See Verran *v.* Baird, 150 Mass. 141, 22 N. E. Rep. 630; Harris *v.* City of Quincy, 171 Mass. 472 (5 Am. Neg. Rep. 270 n.), 50 N. E. Rep. 1042; Carey *v.* Inhabitants of Hubbardston, 172 Mass. 106, 51 N. E. Rep. 521. An examination of the papers in these cases leaves no doubt in our minds that the cases were properly decided, whether the reasons given were in accordance with the rule laid down in Blair *v.* Pelham or not. In Beals *v.* Inhabitants of Brookline, 174 Mass. 1, 54 N. E. Rep. 339, where photographs were admitted, it was said: "In the admission of such evidence much must be left to the discretion of the presiding justice, and we are not prepared to say that there was error in law in permitting them to be shown to the jury." But in this, as in other matters which may be left generally to the discretion of the trial judge, his discretion is not unlimited, and the judge is not at liberty to disregard the rules of law by which the rights of the parties are governed. See Woodward *v.* Leavitt, 107 Mass. 453, 460; Chandler *v.* Aqueduct, 122 Mass. 305. We are of opinion that the rights of the defendant in this case were violated, and that the glass plate, the pictures taken by the defendant, and the evidence offered by the defendant and excluded should have been admitted. It was clearly competent for the defendant to introduce evidence to show that the plaintiff's pictures showing an enlargement of one of the feet, and from which a witness for the plaintiff discovered a fracture, did not represent the left foot, but the right, and for this purpose to show the difference between an ordinary photograph and one taken by an X-ray.

As the only exception relating to the question of liability has been overruled, the new trial will be on the question of damages only. So ordered.

BROWN v. CITY OF OWOSSO.

Supreme Court, Michigan, February, 1901.

DEFECTIVE SIDEWALK — NOTICE OF INJURY TO CITY — STATUTE. — Where plaintiff was injured by tripping on a loose plank on the sidewalk, a notice to the city that plaintiff was injured by falling over a loose plank lying upon the sidewalk, is a sufficient compliance with the statute.

Comp. L., § 3173, requiring the notice to state the manner in which the accident occurred (1).

DAMAGES CLAIMED — NOTICE — STATUTE. — Where the statute, Comp. L., § 3173, relating to persons giving notice of intention to sue the city for injuries sustained from defective sidewalk, requires such persons to state intention to hold the city liable for such damages as may have been sustained, a notice from a person injured that she believed herself entitled to $5,000 therefor, was a sufficient compliance with the statute.

ERROR to Circuit Court, Shiawassee County.

Action by Minnie Brown against the city of Owosso for injuries received through a defect in a sidewalk of the defendant city. From a judgment in favor of the defendant, plaintiff brings error. *Judgment reversed.*

SELDEN S. MINER (SPAULDING, NORTON & DOOLING, of counsel), for appellant.

WATSON & CHAPMAN, for appellee.

HOOKER, J. — The plaintiff brought an action growing out of an injury received by her through a fall upon a board sidewalk in the city of Owosso. That city is incorporated under the general law, sections 3081 and 3173 of the Compiled Laws being involved in this cause. They are as follows:

"Sec. 3081. The council shall audit and allow all accounts chargeable against the city, but no account or claim or contract shall be received for audit or allowance, unless it shall be accompanied by a certificate of an officer of the corporation, or an affidavit of the person rendering it, to the effect that he verily believes that the services therein charged have been actually performed or the property delivered to the city, that the sums charged therefor are reasonable and just, and to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are endorsed or referred to in such account or claim; and every such account shall exhibit in detail all the items making up the amount claimed and the true date of each. It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city for personal injuries or otherwise, that it has never been presented, certified to or verified as aforesaid, to the council for allowance."

"Sec. 3173. The council shall have supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks and public grounds within the city, and shall cause the same to be kept

1. For other actions involving the question of Notice of Injury to Municipal Corporations, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

in repair, and free from nuisance. No city subject to the provisions of this act shall be liable in damages sustained by any person in such city either to his person or property by reason of street, sidewalk, crosswalk, or public highway, situated in such city, unless such person shall serve or cause to be served within sixty days after such injury shall have occurred, a notice in writing upon the clerk or deputy clerk of such city, which notice shall set forth substantially the time when and place where such injury took place, the manner in which it occurred and extent of such injury as far as the same has become known, and that the person receiving such injury intends to hold the city liable for such damages as may have been sustained by him."

The record discloses that the following notice was filed within sixty days: "Minnie Brown, being duly sworn, deposes and says that on Sunday evening, May 29th, 1898, about the hour of 9 P. M,. as she was returning to her home from the Baptist Church in the city of Owosso, and was passing along and was upon the sidewalk in front of lot one, block two, on Oliver street, in the city of Owosso, she was tripped up by a loose plank upon the sidewalk which passes along upon the south side of Oliver street, in said city. By reason of being tripped up by said plank, she fell upon her right knee and right side and hip, severely injuring her knee and her ankle, and injuring her right shoulder, right arm, and her right hip, and that portion of her right side in front and above the hip joint, and injuring herself internally, at and near that place. At the time she was pregnant with child, and her injuries were so great that it produced a miscarriage, and that for a long time her life was despaired of, and that she was compelled, in order to save her life, to employ two physicians and a nurse. That, although at the present time she is much improved, yet she is informed by her physicians, and so believes the truth to be, that her injuries are permanent. That said accident was caused without any negligence upon her part whatever, as she was passing along upon said sidewalk in a careful and prudent manner. That for her said injuries she believes she is entitled to the sum of five thousand dollars. She further says that said accident occurred as above set forth; that the sums charged therefor are reasonable and just; and that, to the best of her knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim. Minnie Brown. Subscribed and sworn to before me this 2d day of July, 1898. Clifford H. McCurdy, Notary Public." This notice was submitted to the common council at its next meeting, and the claim was referred to a special committee. Early in

September, 1898, the committee reported in favor of disallowing the claim, giving no reason therefor. The sixty days had then expired. It is alleged that on April 10, 1899, the plaintiff filed her claim with the clerk, properly sworn to, and this was referred to a committee on claims and accounts, who recommended that it be not allowed. It was so ordered by the vote of the council.

After the opening statement by plaintiff's counsel, the defendant's counsel objected to the introduction of any testimony, and this was sustained, and the court directed a verdict in favor of the defendant. The notice appears in the declaration. Both parties treat the case as depending upon the notice and action of the council. Counsel for the defendant contend that the notice was insufficient, while plaintiff's counsel deny this, but allege that, if defective, the defect was waived by the council. The alleged flaws in the notice are, 1, that the manner in which the accident occurred is not sufficiently set forth; 2, that it does not assert an intention to hold the city liable for such damages as she sustained.

Counsel contend that the notice shows no negligence upon the part of the city, and that it does not state that the walk was defective, or that one of its boards was loose, but that she was injured by falling over a loose plank lying upon the sidewalk. We think this a technically correct construction of the language, though most people would understand that the words "loose plank" referred to a plank of the walk which had become loosened. Had the words been transposed, so as to state that she had been tripped upon the sidewalk by a loose plank, it would have been a more definite statement, though even that would not have excluded the inference that the plank might not have been one that was not at any time a part of the walk. This notice is not a pleading, and we are of the opinion that the requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice, especially in view of the evident intention that a substantial statement should be sufficient, and the serious consequences of reliance upon a defective notice until after the expiration of the sixty-day period.

Again, her statement that she believed herself entitled to $5,000 therefor was not the language used by the statute, but the only inference from the filing of this notice was that she was setting up a claim for $5,000 against the city based upon an injury caused by her falling over a loose board in its sidewalk. No doubt every councilman so understood it, and that would be sufficient were the paper a notice of a defense accompanying a plea. We are not prepared to say that the council might not have required a more specific notice before taking action, but it did not.

It was forcibly urged that the council was under no obligation to consider the question until a proper notice was filed, and that it was incumbent upon it to point out defects. It may be that a notice that does not contain substantial averments in compliance with the statute, as where some statement was wholly wanting, would not impose any duty upon the council to consider it, and might justify it in simply disallowing the claim at its convenience. We do not pass upon that question, but we think where, as in this case, the notice is sufficiently specific to contain a reasonably definite statement of time, place, manner, and extent of the accident to apprise the council of the main facts, and that the injured person is entitled to specific damages by reason thereof, it is sufficient to set the council in motion, and relieve the plaintiff from the charge of non-compliance with the law as to notice. The cases cited are, as counsel claim, somewhat different from this, but there is a tendency shown to treat a notice as sufficient, though it be not technically accurate, when measured by the statute, strictly construed. Thus, in Germaine *v.* City of Muskegon, 105 Mich. 216, 63 N. W. Rep. 78, the plain intimation is given that, to avail itself of such an objection, the disallowance should have been based upon that defect. Inferentially, at least, it would seem to imply that this must be done seasonably, so as to permit a new notice, if possible. Any other inference would involve the conclusion that, after the expiration of the sixty-day period, the rights of the city would depend upon the manner of stating its disallowance of a claim for a liability that had ceased to exist, if it had ever existed.

The judgment is reversed, and a new trial ordered. The other justices concurred.

PRIEUR v. E. H. STAFFORD COMPANY.

Supreme Court, Michigan, March, 1901.

DRIVING — COLLISION — DIRECTION OF VERDICT — NEGLIGENCE OF PARTIES FOR JURY. — In an action to recover damages for injuries received in a collision between vehicles, it appeared that plaintiff had backed his horse and wagon against a freight house to load his wagon with barrels. Opposite the freight house the roadway was twenty-nine feet wide, and plaintiff's horse and wagon occupied twenty feet of the roadway. When the wagon was loaded he started his horse up two feet to enable him to step between the rear of his load and the freight house for the purpose of placing wire across the barrels to prevent them falling off. The horse

and wagon thus occupied all but seven feet of the roadway. While plaintiff was behind his load, defendant's wagon turned into the roadway with a load of furniture, the wagon being seven feet wide, part of the load consisting of church seats ten or twelve feet long, projecting from the sides. Defendant's driver saw the plaintiff's horse and wagon, but not the plaintiff, and in trying to pass plaintiff's horse and wagon, the horse backed and injured plaintiff, it being alleged that plaintiff's horse was struck by part of the projecting load on defendant's wagon. Verdict was directed for defendant. *Held*, that the question of negligence of the parties was for the jury to determine, and direction of verdict was error.

ERROR to Circuit Court, Muskegon County.

Action by Hilaire Prieur against the E. H. Stafford Company. From a judgment in favor of the defendant, plaintiff appeals. *Judgment reversed.*

Plaintiff was a dealer in oil and barrels, and as such frequently went to the freight house of the Chicago and West Michigan Railway Company to receive and unload barrels. He had a tall rack, with slanting sides, upon his wagon on which to load the barrels. Opposite the freight house the roadway was twenty-nine feet wide, and then crowned to an elevation of two feet four inches higher to the railroad track and packing house opposite. Plaintiff backed his horse and wagon at the first door of the freight house next to Third street, and 100 feet therefrom. The hind wheels of the wagon extended a few inches beyond the end of the wagon. With the wheels against the side of the freight house, his horse and wagon occupied twenty feet of the roadway. After he completed his load, he started his horse up two feet to enable him to step between the rear of his load and the freight house, for the purpose of tying wire across the rack to prevent the barrels from falling off. Thus standing, the horse and wagon occupied all but seven feet of the level part of the roadway. He testified that it was necessary for him to get between his load and the building to tie the wires. While he was thus standing behind his load, the defendant's wagon, driven by its servant, turned into the roadway from Third street with a load of furniture, to be taken to one of the doors of the freight house beyond where the plaintiff's horse was standing. The platform wagon was seven feet wide, and a portion of the load consisted of church seats ten or twelve feet long, which projected from the sides. These seats were in the middle of the wagon. The driver saw the horse and wagon, but did not see plaintiff. Thinking that there was room to drive in front of plaintiff's horse, he did so with the right wheels as far upon the elevated part of the highway as he thought was safe. As defendant's horses passed the head of plaintiff's horse he saw them, and testified that he hallooed to the

defendant's driver, but that he paid no attention. No one heard the plaintiff's call, not even the man who stood in the freight house twelve feet from him. Plaintiff's testimony tends to show that one of the seats struck the head of his horse, causing him to back; that he had not time to extricate himself before he was caught between the rear of his wagon and the building and injured. Plaintiff's testimony also tended to show that his horse and wagon stood in the usual way and place for loading and unloading. The only disagreement of fact is whether the head of plaintiff's horse was struck by one of the seats, plaintiff testifying that it was, and the two men on defendant's wagon testifying that it was not. The court directed a verdict for the defendant.

JAMES E. SULLIVAN and CROSS & LOVELACE, for appellant.

SMITH, NIMS, HOYT & ERWIN, for appellee.

GRANT, J. (after stating the facts.) — Was defendant guilty of negligence? The defendant is, of course, responsible for the negligent acts of his driver when engaged in his master's business. The defendant had employed a competent driver and safe horses, and he had placed another employee upon the rear of the load, whose duty it was "to watch and see that the load cleared everything, and that nothing fell off." But these precautions did not relieve him from the negligence of his servant. His servant was driving in a careful and prudent manner, unless the act of attempting to pass within the space left was in itself negligence. Plaintiff's horse and wagon were standing across the roadway, without any driver in sight. Plaintiff was behind his load, and could not be seen. It is a matter of common knowledge that teams, in such places, drive in close proximity to the heads of horses. If there is sufficient room to pass, the driver of the passing vehicle is not guilty of negligence, though the horse take fright and back or run away. The driver of defendant's team would have been justified in backing plaintiff's horse and wagon so as to give him room to pass, unless he had reason to believe that somebody was standing behind the wagon in danger of being injured. Defendant's driver had no reason to suppose or believe that plaintiff was standing there. If he had, defendant would, undoubtedly, be liable, if his driver had intentionally backed his horse, or had driven in such close proximity as to strike the horse's head, and thus cause him to back. Defendant's driver had no knowledge that it was necessary or customary for plaintiff to stand behind his load to draw wires across it. Why should the driver of defendant's team expect that plaintiff was at work in this space of two feet, in the absence of any evidence tending to show that he had any information that this was common or necessary? For all that appeared, plaintiff

might be in the freight house. The learned counsel for plaintiff invokes the rule, as to plaintiff's negligence, that the law did not require him to be on the lookout for danger that could not be expected to exist. For the same reason, defendant's driver could not be required to guard against danger which he had no reason to anticipate. The driver's act can only be made negligence by finding that he had good reason to expect that danger to plaintiff would result by his conduct, and there is no evidence to support such a finding.

2. Was the plaintiff guilty of contributory negligence? Plaintiff was in a public roadway. He knew that teams were liable to pass. Though it be true that his horse was steady, yet had he a right to suppose that his horse would not become frightened at some load passing in close proximity to him, or that he might strike his head, or that the horse might back for fear that he would be struck? He still left room for many teams to pass, and there is no doubt that defendant's driver thought he could pass without striking the horse, and, according to himself and his attendant, who were the only ones in position to see, they did. There is no testimony to show that it was a custom for teamsters doing business at this freight house to start up their teams two feet, and stand behind their loads to arrange them, or that any one ever did so except the plaintiff. He was so intent upon his business that he did not see the defendant's team, and took no steps to look for it, until the heads of the horses were past his own horse. So, too, the driver of defendant's team was intent upon driving his team through this space, taking care not to get his right wheels too far upon the high ground so as to endanger his load, and to avoid hitting the plaintiff's horse. We think it was the duty of the plaintiff to be on the lookout, and that he was guilty of contributory negligence in not doing so. The judgment should be affirmed.

MONTGOMERY, Ch. J. — In addition to the facts stated by my Brother Grant, it should be stated that the plaintiff, in backing his wagon up to the freight house to take on the load, was pursuing the usual course, as the testimony shows; indeed, such testimony was hardly needed, for the very fact that this door was provided suggested that it must have been intended that vehicles to take on freight must approach it in some way. The construction of plaintiff's wagon was such that the freight could not be taken over the side. The only way possible, then, was to back the wagon up to the door. What, then, is the effect of this holding of the Circuit judge? It is that there is no actionable negligence in driving a portion of a load against a horse standing in the highway, or that the occupation of this

portion of the street was negligence *per se* on the part of the plaintiff. In my judgment, neither position can be maintained upon authority. We have so often held that the question of negligence is for the jury when different persons might honestly draw different conclusions from the facts that it is unnecessary to pause to cite the cases. Can it be said that men might differ as to whether it was negligent for this plaintiff to back up to the door of this building provided for that purpose, to take on his load, start his steady, twenty-two-year-old horse ahead far enough to permit it, and step to the rear of his wagon and fasten the load on before driving away, particularly when the evidence shows that it was indispensable to start the horse up in order to admit of fastening the load on? I confess I cannot conceive upon what principle or authority such a holding can be made. On the contrary, in the case cited by defendant (Le Baron *v.* Joslin, 41 Mich. 313, 2 N. W. Rep. 36), the question was held to be for the jury under circumstances quite as strongly tending to show want of care on the part of the plaintiff. In that case the plaintiff left his horse tied by the side of the road, with the hind wheels of the buggy extending to the traveled part. The horse was left standing unattended. The evidence on the part of the defendant tended to show that the defendant's carriage would have passed in safety if the plaintiff's horse had not backed up. Plaintiff's contributory negligence was held to be a question for the jury. It will be seen that in that case there was no necessity for plaintiff's wagon to occupy the position it did, as was the case here. See also Park *v.* O'Brien, 23 Conn. 339; Greenwood *v.* Callahan, 111 Mass. 298.

But, in another view, this case was, as to this question, a case for the jury. The position of the plaintiff's horse was seen by the defendant's driver. It was apparent, or should have been, that, if he attempted to drive through the space left, some portion of the load must come in contact with the plaintiff's horse. Two solid substances cannot occupy the same space at the same time. Had the driver, then, the right to proceed to drive against the plaintiff's horse, and charge the consequences to the plaintiff's alleged pre-existing and discovered negligence? The law has not been so since the decision of Davies *v.* Mann, 10 Mees. & W. 545 (1).

1. In Davies *v.* Mann, 10 M. & W. 546, an action for killing an ass, which the declaration alleged to have been lawfully upon the highway when it met its death, it appeared that the animal, fettered by the fore feet, had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's wagon, which, without its driver, was coming at a smartish pace along the road. *Held*, that the jury were properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of

In this leading and familiar case the question presented was very similar to the one here involved.. Plaintiff had left his donkey tethered in the public highway. The court said: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or purposely running against a carriage going on the wrong side of the road." Was there evidence tending to show defendant's negligence? My views upon this question can, perhaps, be deduced from what has been said. The idea that the defendant's driver, approaching this place with a load too wide to pass through it without taking the horse in the way, might proceed, and not be chargeable with negligence, is not justified.

The judgment is reversed, and a new trial ordered.

HOOKER, MOORE, and LONG, JJ., concurred with MONTGOMERY, Ch. J.

SMILEY v. ST. LOUIS AND HANNIBAL RAILROAD COMPANY.

Supreme Court, Missouri, Division No. 1, February, 1901.

POSTAL CLERK INJURED IN DERAILMENT OF TRAIN — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF — INSTRUCTION. — In an action to recover for personal injuries sustained by plaintiff, a postal clerk, by reason of defendant's train on which he was riding being derailed, where contributory negligence of plaintiff was not alleged, nor was there any evidence of such negligence, an instruction was not erroneous which transferred the burden of proof to defendant without requiring the jury to find that plaintiff was without fault at the time of the accident (1).

FUTURE PAIN — DAMAGES. — Where the evidence tends to prove permanent injuries to plaintiff, and further pain to body or mind is reasonably certain, a sufficient basis is laid for compensation for future pain and suffering.

the accident, the plaintiff was entitled to recover. It was also held that the general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet, unless he could, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover.

1. For actions relating to Accidents Caused by Derailment of Trains, etc., from the earliest period to 1897, see vols. 9 and 10 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic to date are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

PLEADING AND PRACTICE — OBJECTION TO PETITION ON APPEAL. — Where the case was fought on the theory that the petition sufficiently alleged specific injury to paintiff's mind from the accident, that fact being conclusively proved, and no objection was made to the petition in the lower court on the ground of insufficiency, such objection cannot be raised for the first time on appeal.

APPEAL from Circuit Court, Boone County.

Action by Samuel W. Smiley against the St. Louis and Hannibal Railway Company. From judgment for plaintiff defendant appeals. *Judgment affirmed.*

J. D. HOSTETTER and GEORGE A. MAHAN, for appellant.

CHAS. J. WALKER, NORTON, AVERY & YOUNG and TURNER & HINTON, for respondent.

BRACE, P. J. — This is an action for personal injuries, in which the plaintiff obtained judgment in the court below for $5,000, and the defendant appeals.

The errors assigned for reversal are the giving of instructions numbered 2 and 3 for the plaintiff, the refusal to give instruction numbered 11 for the defendant, the admission of illegal evidence for the plaintiff, the exclusion of legal evidence for the defendant, and the refusal of the court to grant a new trial on the ground of excessive damages. The pleadings and evidence, so far as is necessary, will be noticed in the course of the opinion. Instructions numbered 2 and 3 given for the plaintiff are as follows: "2. The court instructs the jury that if they believe from the evidence that the plaintiff was a postal agent in the employment of the United States, and that at the time of the accident, while in the discharge of his duties as such postal agent, he was being transported on defendant's passenger train in a postal or mail car, with the knowledge and consent of defendant, and that such train was derailed, overturned, and thrown down an embankment, and that the plaintiff thereby received injuries to his head, body, or ankle, then it devolves upon the defendant to prove to the satisfaction of the jury that such derailment and overturning of said train was not caused by any fault, negligence, or carelessness on its part in running said train, and in providing and maintaining a reasonably safe track and roadbed over which to run the same and, unless it is so shown, the verdict should be for the plaintiff. 3. If the jury find for the plaintiff, then, in assessing his damages, they will allow the reasonable expense, if any, which they may believe from the evidence that he has incurred for medical treatment growing out of the injuries sustained by him in the derailment of defendant's train. They will also allow him a reasonable compensation for the loss of time and

earnings, if any, that they may believe from the evidence that he has sustained up to the present time in consequence of such injuries; and the jury may take into consideration the impairment, if any, in plaintiff's capacity to earn a livelihood, which they may believe from the evidence that he has sustained in consequence of such injuries, and allow him a reasonable compensation therefor; and the jury may also take into consideration the physical pain and mental anguish, if any, that they may believe from the evidence that he has suffered in consequence of such injuries, and allow him a reasonable compensation therefor; and also they may take into consideration the physical pain and mental anguish, if any, that they may believe from the evidence that he will suffer in the future in consequence of such injuries, and allow him a reasonable compensation therefor — not to exceed in all the sum of ten thousand dollars."

1. The first objection urged to plaintiff's instruction No. 2 is that it "transfers the burden of proof to defendant, without requiring the jury to find that the plaintiff was without fault at the time of receiving his injury;" in answer to which it is only necessary to say that while, in a proper case, such a qualification of an instruction of this character may be necessary, there was no necessity for it in this case. The answer was simply a general denial. Contributory negligence on the part of the plaintiff was not alleged, nor was there a scintilla of evidence tending to prove such negligence on his part. On the contrary, the undisputed evidence was that the plaintiff was at his post, in the discharge of his duties, at the time the train was derailed, overturned, and thrown down the embankment by reason of the defective condition of the defendant's roadbed, inflicting upon him the injuries of which he complains. The law presumes that he was in the exercise of ordinary care at the time, in the absence of any proof to the contrary, and, as this instruction properly told the jury, devolved upon the defendant the duty of showing that the derailment and overturning of the train was not caused by its negligence. Buesching *v.* Gaslight Co., 73 Mo., loc. cit. 233; Dougherty *v.* Mo. Pac. R'y Co., 81 Mo. 325; Magoffin *v.* Mo. Pac. R'y Co., 102 Mo. 540, 15 S. W. Rep. 76; Furnish *v.* Mo. Pac. R'y Co., 102 Mo. 438, 13 S. W. Rep. 1044; Clark *v.* Railway Co., 127 Mo. 197, 29 S. W. Rep. 1013; Och *v.* Mo., Kan. & Tex. R'y Co., 130 Mo. 27, 31 S. W. Rep. 962; Hite *v.* Met. St. R'y Co., 130 Mo. 132, 31 S. W. Rep. 262, 32 S. W. Rep. 33 (1).

1. See these cases, cited in the case at bar, reported in the series of American Negligence Cases as follows: Dougherty *v.* Mo. Pac. R. R. Co., 81 Mo. 325, 4 Am. Neg. Cas. 532; Magoffin *v.* Mo. Pac. R'y Co., 102 Mo. 540, 9

It is next urged that this instruction is vicious, because there was no evidence on which to base a finding for injury to the "body." While the particular physical injuries testified to were to the head, neck, and ankle, the evidence tended to prove that the whole organization of the plaintiff, physical and mental, was shocked, impaired, and injured in the accident and this objection is no more tenable than the first. Upon the facts of this case, the instruction was unobjectionable.

2. That part of plaintiff's instruction No. 3 which tells the jury that "they may take into consideration the physical pain and mental anguish, if any, that they believe from the evidence that he will suffer in the future in consequence of such injury," is objected to on the ground that there was no evidence upon which to base a finding for future suffering. The accident occurred on the 14th of May, 1895. The evidence tended to prove that in the wreck the plaintiff received a blow on the left temple, above the ear; another on his right eye; another on the top of his head; and an injury to one of his ankles, causing an incomplete dislocation of one of the bones, and a rupture of the interosseous ligament; and that, as a result of these injuries to the head and neck, there followed a continuous headache, buzzing in the ears, accompanied by a dizziness that at times rendered him unconscious, a pain and numbness in the back of the neck at the base of the brain, where a knot about the size of a walnut was afterwards developed. These symptoms continuing, it also soon became apparent that his mind was seriously affected. His mental disorder gradually growing worse until the following February, when he became violently insane, and thereafter, on the 18th day of April, 1896, was taken to St. Vincent Asylum, at St. Louis, where he remained under treatment until July, 1896; but, getting no better there, he was afterwards, in September, 1896, taken to the insane asylum at Fulton, where he remained under treatment until discharged in March, 1897. The case was tried in the lower court on the 22d of February, 1898. The plaintiff was then sane, and testified as a witness on the trial. As to the condition of his ankle he testified that when he walked it pained him, and the evidence of the physician who then examined him tended to prove that the injury was permanent, and calculated to give him pain when walking on uneven ground. The evidence of the medical experts also tended to prove that, while he was then sane, he was not wholly restored, but was liable to a recurrence of

Am. Neg. Cas. 537n.; Furnish *v.* Mo. Pac. R'y Co., 102 Mo. 438, 9 Am. Neg. Cas. 515; Och *v.* Mo., Kan. & Tex. R'y Co., 130 Mo. 27, 9 Am. Neg. Cas. 536 n.; Hite *v.* Met. St. R'y Co., 130 Mo. 132, 9 Am. Neg. Cas. 537 n.

his mental disorder. "When it appears that the injury is permanent, and further pain to body or mind is reasonably certain, a sufficient basis is laid for compensation for these elements." Gerdes *v.* Foundry Co., 124 Mo. 347, 25 S. W. Rep. 557; Gorham *v.* Railway Co., 113 Mo. 408, 20 S. W. Rep. 1060; Rosenkranz *v.* Railway Co., 108 Mo. 9, 18 S. W. Rep. 890; Chilton *v.* City of St. Joseph, 143 Mo. 192, 44 S. W. Rep. 766. When the whole of the evidence on this subject is taken into consideration, this objection to this instruction is found to be untenable. The remaining objection to this instruction will be considered in connection with defendant's refused instruction numbered 11, which is as follows: "11. The court instructs the jury that there is no evidence that plaintiff's insanity resulted from injuries received in the wreck, and you will not include such insanity as an element of damages in making up your verdict."

3. While this refused instruction is predicated solely upon the insufficiency of the evidence, the contention of counsel for the defendant is that the petition "did not sufficiently allege any specific injury to the mind, so as to authorize either the reception of testimony as to plaintiff's insanity or the taking into consideration of such insanity as an element of damages," and for this reason the court erred in refusing this and in giving plaintiff's instruction No. 3. The fact that the plaintiff became insane after the accident was proven beyond dispute, and there was much evidence tending to prove that his insanity was produced by the injuries received in the wreck. The court could not be convicted of error in its action on these instructions on the ground that there was not evidence sufficient upon which to predicate such action. Hence the attack is now changed from the evidence to the pleadings; and the sufficiency of the petition in the particular mentioned, not raised in the trial court by demurrer, by objection to the evidence of this subject, or even by these instructions, or in any other manner, is now sought to be raised for the first time in this court. Although the plaintiff's insanity might have been charged more specifically, and the petition might have been obnoxious to a timely motion to make it more definite and certain, yet, no objection having been made to it on this ground in the lower court, and the whole case having been fought through that court upon the theory that the petition sufficiently charged that the plaintiff's insanity, characterized in the petition as "mental ailments," for which he had been confined in a "lunatic asylum," and resulting in "mental injuries," for which he asked damages, was caused by the derailment and wrecking of defendant's train through its negligence, it is now too late to raise

this objection. Mellor *v.* Mo. Pac. R'y Co., 105 Mo. 455, 16 S. W. Rep. 849, and cases cited (1); Boggess *v.* Railway Co., 118 Mo. 338, 23 S. W. Rep. 159, 24 S. W. Rep. 210.

4. On the trial the deposition of Dr. Henry W. Herman, the physician in charge of St. Vincent Asylum at the time the plaintiff was under treatment at that institution, was read in evidence in his behalf, in which the following question and answer occurs: "Q. From the examination that you made of him, and the history of his case, to what causes did you attribute his insanity? A. I attributed them mainly to an accident that had preceded, from what I learned, a severe railroad accident. This I learned from statements of those who brought him there." This answer was objected to on the ground that it was an opinion formed from hearsay testimony. The only hearsay fact disclosed by his answer was the "severe railroad accident," which, with other facts proven in the case, was afterwards stated in a hypothetical case, to which the defendant made no objection, and upon which the witness gave his opinion as an expert. It does not appear from this answer, nor from any of his evidence in the case, that he predicated his opinion of the cause of the plaintiff's insanity upon any statement of others, except as to this undisputed and conceded fact, so that no error affecting the merits of the case was committed in the admission of this evidence.

5. On plaintiff's cross-examination he was asked: "Did the doctor (Baskett) tell you or not that your then condition was due to the train motion simply, and to that alone?" And at the close of the plaintiff's testimony he was called by the defendant, and asked this question: "Among those depositions that you gave to the jury in this case you and your attorney have not offered to read to the jury the depositions of Dr. Bishop and Dr. Baskett, either of them, have you?" These were the physicians who treated the plaintiff for his physical ailments in the earlier stages of his afflictions, and before his alienation of mind had become pronounced, and it is so obvious on the face of the record that the affirmative answer which these questions sought to elicit, if given, could not have materially affected the merits of the case, that we deem it unnecessary to consider their propriety.

6. The amount of damages awarded by the jury and sanctioned by the trial court for the plaintiff's injuries, physical and mental, are within the bounds of reasonable compensation. Our sense of justice is not shocked thereby; nor does that amount, or the facts in evidence, for a moment suggest that the jury, in awarding it,

1. There is a note of Mellor *v.* Mo. Pac. R'y Co., 105 Mo. 455, in 9 Am. Neg. Cas. 537.

were swayed by partiality, passion, prejudice, or any unworthy motive. Although the record in this case has been thoroughly and industriously combed by the learned counsel for the defendant, and every possible objection to the judgment presented with their usual force and skill, no substantial error warranting a reversal has been disclosed.

The judgment of the Circuit Court will therefore be affirmed. All concur.

STERN v. JOHN C. BENSIECK AND THE CITY OF ST. LOUIS.

Supreme Court, Missouri, Division No. 2, March, 1901.

BOY INJURED ON SIDEWALK — DEGREE OF CARE REQUIRED OF INFANT — INSTRUCTION. — In an action to recover for loss of services and expenses incurred by plaintiff by reason of an injury to his minor son, caused by a fall on a defective sidewalk upon which defendant Bensieck's property abutted, an instruction, given at request of defendant Bensieck, that plaintiff's son was bound to exercise such care and caution "as a boy of his age, experience and intelligence was individually capable of," was erroneous, as he was only required to exercise that ordinary care and prudence which, under like circumstances, could reasonably be expected of a boy of his years, capacity and experience.

DEFECTIVE SIDEWALK — PLEADING — PROOF. — In such action it was also error to charge, at the request of defendant city, that plaintiff was bound to prove all the facts alleged in his petition, where plaintiff alleged that the planks and supports of the sidewalk were rotten, worn out, out of place, and warped so as to form a dangerous obstruction to persons passing over the same, as the substance of the issue being a defective sidewalk, plaintiff made out a case if he proved that fact (1).

APPEAL from St. Louis Circuit Court.

Action by Abraham Stern against John C. Bensieck and the city of St. Louis. From judgment for defendants, and from an order granting plaintiff a new trial, defendants appeal. *Judgment affirmed.*

This is an appeal by defendants from an order of the Circuit Court of St. Louis awarding plaintiff a new trial. The action is by the father of a minor for the loss of services and expenses incurred by him by reason of an injury to his son, caused by a fall on an alleged defective sidewalk upon which defendant Bensieck's property

1. For other actions relating to Personal Injuries Sustained on Defective Sidewalks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

abutted. The petition alleged, in substance, that defendants maintained in front of premises known as "No. 1113 North Broadway, St. Louis," a wooden sidewalk; that on the 28th day of September, 1895, and for a long period prior thereto, the said sidewalk was in a dangerous and defective condition, unfit and unsuited for the passage of pedestrians thereon; that the planks and supports of said sidewalk were rotten, worn out, out of place, and warped so as to form a dangerous obstruction to persons on foot passing over the same, especially at night; that the city of St. Louis, by its proper officers having charge of keeping its sidewalks in repair, knew of said defective condition of said sidewalk in time to have repaired the same before the injury to plaintiff's son, yet neglected to do so; that on the night of September 28th plaintiff's son was passing over said sidewalk, and, while doing so, by reason of said defective condition of the sidewalk his foot was caught against and under a plank of said sidewalk, whereby he was thrown down, breaking his right arm near the elbow; that plaintiff was entitled to the earnings of his son during his minority; that by the injury to his son plaintiff has lost the earnings of his son during his minority, and incurred expenses for medicines, medical attention, and nursing to the damage of the plaintiff in the sum of $5,000, etc. The answer of defendant Bensieck was a general denial, with a plea of contributory negligence. The answer of the city of St. Louis was a similar plea. There was a general denial for reply. For the purpose of this discussion it is sufficient to say that there was evidence tending to support the petition and answers and reply. There is no dispute upon this question, so that we shall proceed to discuss the grounds urged for a reversal. Upon the trial of the case the jury rendered a verdict for both defendants, and upon motion for a new trial the court sustained the motion, set aside the verdict, and ordered a new trial because of its errors in giving instruction No. 4 at the instance of defendant Bensieck, and instruction 5 given at the request of the city. These were the errors assigned upon the record by the court as its grounds for granting a new trial, though others were assigned in the motion. Since the appeal to this court, defendant Bensieck has died, and the cause has been abated as to him by the judgment of this court. The two instructions, No. 4 given at the instance of Bensieck, and No. 5 given at the instance of the city, are as follows: "4. The son of the plaintiff was bound to exercise such reasonable care and caution for his personal safety while using the sidewalk as a boy of his age, experience, and intelligence was individually capable of, and as shown by the evidence. And if, from the evidence, the jury believe that plaintiff's said son knew, or, by

the exercise of the degree of care aforesaid, would have known, of the condition of said sidewalk, but did not, at and just before the time he was injured, exercise said degree of care, and directly contributed to his being hurt, then the jury will find for the defendants." "5. The jury are instructed that it devolves upon the plaintiff to prove to the satisfaction of the jury: First, that the planks and supports of the sidewalk on the west side of Broadway in front of No. 1113 N. Broadway were rotten, worn out, out of place, and warped so as to form a dangerous obstruction to persons on foot passing over the same when exercising ordinary care as defined in these instructions; and, second, that the plaintiff's son was injured, while passing along said sidewalk, by reason of having his foot caught under a plank of said sidewalk. And, unless the plaintiff has shown these facts to the satisfaction of the jury, the verdict must be for the defendant the city of St. Louis."

B. SCHNURMACHER and CHAS. C. ALLEN, for appellants.

MORRIS TUCKER and A. R. TAYLOR, for respondent.

GANTT, J. (after stating the facts). — 1. It is insisted by plaintiff that the court properly set aside the verdict for the giving of said instruction No. 4, because it exacted the highest degree of care of which the boy was capable, whereas he was only required by the law of this State to exercise that ordinary care and prudence which, under like circumstances, could reasonably be expected of a boy of his years, capacity, and experience. We think the Circuit Court erred in said instruction. The instruction exacted the highest degree of care of which the boy was capable. He was capable of exercising the highest degree of care that a boy of his age and intelligence could exercise. An adult is only required to exercise that ordinary care in traveling along the streets of a city that a reasonably prudent person would observe under similar circumstances, not the highest care of which he is capable, and yet this instruction exacts more of a boy of tender years than is required of an adult. The rule is too well settled to admit of discussion. Municipal corporations are bound to keep their streets and highways free from obstructions, and reasonably safe for travel in the usual modes, and are liable for injuries caused by neglect to do so. Russell *v.* Inhabitants of Columbia, 74 Mo. 480: Loewer *v.* City of Sedalia, 77 Mo. 431; Franke *v.* City of St. Louis, 110 Mo. 516, 19 S. W. Rep. 938; Roe *v.* City of Kansas City, 100 Mo. 190, 13 S. W. Rep. 404. A child is not deemed negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. Beach, Contrib. Neg., sec. 117; Burger *v.* Railroad Co., 112 Mo. 238, 20 S. W. Rep.

439; Williams *v.* Railroad Co., 96 Mo., *loc. cit.* 283, 9 S. W. Rep. 573.

2. The fifth instruction obtained by the city was erroneous. Plaintiff was not bound to prove all the defects he alleged. Counsel for the city concedes that, if the sidewalk was defective, either by being rotten or worn out, or because a plank was out of place in it, or a plank was so warped as to create an obstruction, with notice to the city, and plaintiff was injured by either, while exercising ordinary care on his part, he would be entitled to recover; but insists that, because plaintiff alleged the walk was defective in all these respects, he must prove all, or he cannot recover. This is not tenable. It was only essential that he should prove the sidewalk was defective from either of these causes, with notice to the city thereof, and his resulting injury, to make out his case. Morrow *v.* Surber, 97 Mo., *loc. cit.* 161, 11 S. W. Rep. 48; Robertson *v.* Railroad, 152 Mo., *loc. cit.* 392, 53 S. W. Rep. 1082; Knox Co. *v.* Goggin, 105 Mo. 191, 16 S. W. Rep. 684. The substance of the issue was a defective sidewalk, and if plaintiff proved that fact either by showing it was rotten or was warped, of which the city had notice, and his son was injured thereby, he made out a case, and he was not required to prove all, or be defeated. As said by Sherwood, J., in Frederick *v.* Allgaier, 88 Mo. 604: "Although it is a fundamental rule of evidence that the evidence must correspond with the allegation, yet it is equally fundamental that it is sufficient if the substance of the issue be proved." "The fact that the answer was drawn too broadly did not require that defendant should be required to offer proof or submit to instructions as broad as the allegations of the answer." The Circuit Court, then, was not in error in holding it had committed error in giving the instruction. As to the point that the verdict was for the right party, we need only say that there was a sharp conflict of testimony, and in such case it is not our province to pass on the weight of evidence.

The circuit judge awarded a new trial, and committed no error in so doing, and his judgment in so doing is affirmed. All concur.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY v. YOST.

Supreme Court, Nebraska, March, 1901.

ACCIDENT AT RAILROAD CROSSING — DUTY OF PEDESTRIAN TO LOOK BEFORE CROSSING TRACK — PRACTICE — APPEAL — LAW OF CASE — REVERSAL—DISCRETION OF COURT. — 1. It is the duty of one who is about to step upon a railroad track to look in each direction to ascertain whether a train is coming, and, if his failure so to do results in his injury, he cannot recover therefor (1).

2. Questions decided on a former review become the law of the case.

3. On reversing a cause, it is within the discretion of the appellate court to either render such judgment as should have been rendered by the lower court, or to remand the cause for a new trial, or with instructions to enter judgment without a second trial.

(Syllabus by the Court.)

ERROR to District Court, York County.

Action by Anthony Yost against the Chicago, Burlington, and Quincy Railroad Company. From judgment for plaintiff, defendant brings error. *Judgment reversed.*

F. C. POWER, J. W. DEWEESE, and F. E. BISHOP, for plaintiff in error.

GEO. B. FRANCE, MERTON MEEKER, and BATES & KIRKPATRICK, for defendant in error.

NORVAL, Ch. J. — This cause was before us at a prior term, and an opinion reversing the judgment and remanding the cause is reported in 56 Neb. 439, 76 N. W. Rep. 901. On the second trial, plaintiff again recovered judgment, which is before us for review. The former judgment was reversed for the reason that the evidence of plaintiff conclusively showed that he was guilty of contributory negligence, which was the proximate cause of the injury. On the second trial the evidence was more definite and explicit regarding several matters discussed in the former opinion. For instance, there is now a conflict of evidence as to whether at the time of the accident the wind was blowing from a northerly or a southerly direction. On the first trial the evidence was not conflicting, but was to

1. For other actions relating to Accidents at Railroad Crossings, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports. See also note on the Rule of Stop, Look and Listen, 9 AM. NEG. REP. 408–416, *ante.*

the effect that it was from the south. This was discussed at some length by the commissioner who wrote the opinion as bearing upon the question of whether it was possible for the plaintiff to have seen the approaching engine which caused his injury in time to have avoided it. The evidence on the last trial was also more explicit regarding his actions from a time immediately after the gravel train passed him to the instant of time at which he received his injuries. It is now quite clear that at the moment the gravel train passed him he was standing at the bottom of the fill, which at this point is about six feet high, and was distant some twelve feet from the track. He testifies that immediately after the gravel train passed him, going to the west, he looked toward the east, but saw nothing approaching him from that direction. At that instant he started to ascend the fill for the purpose of returning to his work upon the track at the top of the fill. From the time he started to return to his work he did not again look east, and was struck by the switch engine, which came from that direction. The engine struck him immediately after he reached the track. He had approached the track from the south. He says that as he ascended the inclined plane which made the side of the fill he did not look to the east, but (to use his own language) "was looking where I was stepping going up to my work," and did not look to the east after he reached the top of the fill. There is also disclosed by the evidence the fact that immediately east of the point where he was injured there was a "wing fence," which crossed the right of way on the south side of the track, and extended to the south end of the ties, where there is a cattle guard usual at railroad crossings. This fence was about six feet high, and consisted of fencing boards nailed upon posts, the intervening cracks between the boards being about six inches wide. About five feet before this fence reached the track, its top slanted down to the ends of the ties, or edge of the cattle guard. He testifies that this fence, with the accompanying smoke and dust of the train which had just passed, and the embankment and curve of the track, prevented him from seeing the approaching engine, when he looked while standing at the bottom of the fill. It is clear, however, that after he reached the top of the fill, and before he went upon the track, his head was above the level of the fence, which at that point slopes down, as before explained; also that, unless the dust and smoke interfered, he had an unobstructed view of the track to the east from 100 to 575 feet. There is nothing in the evidence that would justify any reasonable man in believing that the dust and smoke could possibly have prevented him from seeing an approaching engine over the whole of that distance had he looked

to the east after he climbed the grade and reached the level of the track. He did not, therefore, on the second trial, place himself in any better position than on the first. Regarding the latter, this court held that, while he testified that he looked to the east before he went upon the track, and saw nothing, the evidence and surrounding circumstances were conclusive that, if he did look, he failed to use his sense of sight. On the second trial he merely shows that at the time he looked it was impossible, owing to the existence of the wing fence, the dust and smoke of the passing train, and the contour of the ground immediately east of him, for him to see the approaching engine. But the evidence is clear that, had he looked to the east after he ascended the embankment, he would have encountered no obstacle to his vision, short of the curve 100 to 575 feet distant, which could possibly have prevented him from seeing the engine which injured him. This evidence then obviously strengthens the former opinion of this court, for it discloses the reason why plaintiff did not see the approaching engine when he looked. It shows conclusively that he had ample opportunity to see it had he exercised ordinary care in looking when his eyesight would have availed him to see his danger in time to avoid it. The former opinion being the law of the case (Mead *v.* Tzschuck, 57 Neb. 615, 78 N. W. Rep. 262; Wittenberg *v.* Mollyneaux, 59 Neb. 203, 80 N. W. Rep. 824; Hayden *v.* Frederickson, 59 Neb. 141, 80 N. W. Rep. 494; Drug Co. *v.* Teasdall, 59 Neb. 150, 80 N. W. Rep. 488), it is necessary to again reverse the judgment, and remand the cause for further proceedings.

Counsel insists that it is the duty of the court to render judgment for defendant under section 594 of the Code of Civil Procedure, where it is permitted to this court, on reversal of a cause, in its discretion to proceed to render such judgment as the court below should have entered, or to remand it for judgment. As this is a causé for the particular cognizance of a jury, and as we are unable to foresee what further evidence may be adduced on another trial, we are inclined to the belief that the ends of justice will be more surely accomplished by awarding a new trial. Porter *v.* Banking Co., 40 Neb. 274, 58 N. W. Rep. 721.

The judgment is therefore reversed, and the cause remanded.

DUSENBURY v. NORTH HUDSON COUNTY RAILWAY COMPANY.

Supreme Court, New Jersey, February, 1901.

STREET CAR DERAILED — OBSTRUCTION ON TRACK — DIRECTING VERDICT — QUESTION FOR JURY. — A car of the defendant company, while plaintiff was riding upon it as a passenger, was suddenly derailed, and the plaintiff thereby thrown to the floor and injured. The derailment of the car resulted from its colliding with a paving stone, which lay between the rails and was wholly or partially covered by snow and slush. *Held*, that it was for the jury, not the court, to determine whether the presence of the paving stone might not have been discovered, and the accident avoided, by the exercise of that high degree of care which the law imposes upon common carriers for the safety of their passengers (1).

(Syllabus by the Court.)

ACTION by Jane F. Dusenbury against the North Hudson County Railway Company. Verdict for defendants. Rule to show cause why new trial should not be granted made absolute.

Argued November term, 1900, before DEPUE, Ch. J., and DIXON, GUMMERE, and COLLINS, JJ.

E. L. MCBURNEY and THOMAS WATTS, for plaintiff.

WILLIAM D. EDWARDS, for defendants.

GUMMERE, J. — This is an action to recover for personal injuries received by the plaintiff, as she alleges, by reason of the negligence of the defendants. At the trial the verdict for the defendants was directed, the trial judge being of opinion that the proofs failed to disclose any negligence on their part. The following were the facts proved, bearing upon the question of the negligence of the defendants: On November 28, 1898, while the plaintiff was riding as a passenger upon one of the trolley cars of the defendants, there came a crash, the car was derailed, and so suddenly brought to a stop that the plaintiff was violently thrown from her seat to the floor, and badly hurt. The shock was so great that the car windows were broken, the stove was overturned, and the rear end of the car smashed in. This was the plaintiff's case. On the part of the defendants it was shown that the derailment and sudden stoppage

1. For actions relating to Derailment of Street Cars, Trains, etc., from the earliest period to 1897, see vol. 8 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions on the same topic to date are reported in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

of the car were due to the fact that it had struck a loose paving block, which was lying between the rails, and was wholly or partially covered by snow and slush. By the evidence offered on the part of the plaintiff a *prima facie* case was made out against the defendant company. The mere happening of the accident, in the absence of explanation of the cause of its occurrence, justified the inference that it was due to some negligence on the part of the defendant company. This is the rule laid down by the court of errors and appeals in the case of Whalen *v.* Consolidated Traction Co., 61 N. J. Law, 606, 4 Am. Neg. Rep. 422, 40 Atl. Rep. 645, and again in the later case of Traction Co. *v.* Demarest, 62 N. J. Law, 755, 42 Atl. Rep. 729. At the close of the plaintiff's case, therefore, the burden rested upon the defendants of proving that the accident was not the result of lack of care on their part. This the trial judge considered that the defendants had conclusively shown by their proof as to the manner in which the accident happened. It seems to me that the view of the trial judge as to the conclusive effect of this testimony was erroneous. The company and its employees were charged with the exercise of a high degree of care for the safety of the plaintiff, who was a passenger upon their car (Whalen *v.* Traction Co., *supra*, and cases cited), and their liability depended upon whether the motorman who was running the car would have detected the presence of the paving stone if he had used that great care which the law imposed upon him; and, if he would have discovered it, then whether the presence of the stone should have suggested to him the danger of an accident, such as that which it brought about, in case the car was attempted to be run over it. These were clearly questions which should have been submitted to the jury, rather than answered by the court.

The rule to show cause should be made absolute.

ROWE v. NEW YORK AND NEW JERSEY TELEPHONE COMPANY ET AL.

Supreme Court, New Jersey, February, 1901.

BOY KILLED BY ELECTRIC WIRE ON SIDEWALK — GUARDS — NEGLIGENCE FOR JURY — DAMAGES. — 1. One of the defendants maintained in a public street a line of wires carrying a harmless current of electricity, and the other defendant maintained in the street, below that line, a transverse line of wires, carrying a dangerous current. There were no guards to prevent one of the upper wires that fell from coming in contact

with the lower wires, and thus conducting their dangerous current down to the surface of the street. *Held*, that the absence of such guards would sustain a finding that both defendants had neglected their duty to travelers on the highway.

2. Under the circumstances of this case, the question whether a boy walking along the street was guilty of negligence in failing to avoid an electric wire lying across his path was for the jury.

3. Under the circumstances of this case, a verdict of $5,126 for the pecuniary loss resulting to his next of kin from the death of a boy twelve years old was excessive.

(Syllabus by the Court.)

ACTION by Sarah A. Rowe against the New York and New Jersey Telephone Company and the Hudson County Electric Company. Verdict for plaintiff. Rule to show cause why new trial should not be granted. *Verdict set aside conditionally.*

Argued November term, 1900, before the CHIEF JUSTICE and DIXON, J.

VAN BUSKIRK & PARKER, for plaintiff.

HENRY S. WHITE, for defendant, New Jersey Telephone Co.

CHARLES W. FULLER, for defendant, Hudson County Electric Co.

DIXON, J. — Between seven and eight o'clock in the evening of August 5, 1899, Clarence D. W. Rowe, a boy about twelve years old, while walking along the sidewalk of Thirty-fourth street, in Bayonne, struck his foot against a wire charged with electricity, and was instantly killed. This suit was brought by his administratrix to recover for the pecuniary loss resulting from his death to his mother, sister, and two brothers. The jury in the Hudson circuit awarded the plaintiff $5,126, and the defendants now apply for a new trial. The wire touched by the boy belonged to the New York and New Jersey Telephone Company, but the current of electricity that killed him came from the wires of the Hudson County Electric Company. The evidence shows that a little while before the accident a squall had passed over the neighborhood, during which the telephone wire had been broken, and had fallen upon the wires of the electric company, beneath it, which were strung at right angles to the telephone wires, and thus it carried the current from them to the ground.

The first question for consideration is whether any circumstances were shown on which it was permissible for the jury to find that the defendant companies, or either of them, had been guilty of negligence in the premises. We think the omission of the companies to construct guards between their lines at the place where they crossed,

1. See note on Liability for Personal Injuries Caused by Electric Wires, 8 Am. Neg. Rep. 213-221.

so that, if an upper wire broke, it would not come in contact with the heavily charged wires below, was a fact on which a finding of negligence in each can be supported. In view of the dangerous nature of a wire charged with a strong current of electricity, it is entirely reasonable to hold that corporations using the public highway for wires that may be so charged should exercise a high degree of care to keep the wires where travelers will not be likely to come in contact with them. Anderson *v.* Jersey City Electric Light Co., 63 N. J. Law, 387, 6 Am. Neg. Rep. 314, 43 Atl. Rep. 654 (1). Where, as in the present case, a line of telephone wires, carrying normally a harmless current, is crossed beneath by a line of wires carrying normally a deadly current, a guard running parallel with the lower line, and between it and the upper, would certainly afford additional protection to travelers on the street below, should a break happen in an upper wire. We perceive no reason for deciding that juries may not hold, in proper cases, that such a safeguard is due to the public. But, assuming that such a guard may be required, we must consider whether the duty of providing it may be imposed on both companies. The obligation of the electric company may readily be indicated. The telephone company's system was first erected, and was in operation when the electric company constructed its line. The latter company therefore took its privilege of using the street subject to the fact that the telephone wires were there crossing its route. In view of this fact, it placed its wires below, and introduced the deadly current, thus making dangerous the wires of the telephone company, which before had been harmless. Against the danger thus created by the electric company, its duty plainly required it to guard by all reasonable means. The obligation of the telephone company is not so palpable, but still we think it may be deduced from settled principles. Every person using the highways is bound to exercise reasonable care to protect others from harm through his use. In case the use is continuous, the degree of care required will not be governed by the condition of the highway at the time the use began, but will change as that condition changes, and must keep pace with the circumstances as they occur. A corporation authorized by law to occupy the public streets with appliances for its business holds the privileges subject to such regulations as are reasonably necessary for the common use of the streets for all lawful purposes. North Hudson Co. Ry. Co. *v.* Mayor, etc., of City of Hoboken, 41 N. J. Law, 71; Trenton Horse R. Co. *v.* Inhabitants of City of Trenton, 53 N. J. Law, 132, 20 Atl.

1. See subsequent decision in the Anderson Case, in the New Jersey Court of Errors and Appeals, 8 Am. Neg. Rep. 82.

Rep. 1076; Consolidated Traction Co. *v.* City of Elizabeth, 58 N. J. Law, 619, 34 Atl. Rep. 146. When, therefore, the electric company, under legislative sanction, placed their structures in the street, a new state of things appeared, with reference to which the care demandable from the telephone company must be gauged. It at once became the duty of that company to adopt reasonable measures to protect travelers from danger attending its own use of the street as occupied by the electric company's system. From this it follows that, if a guard such as is above mentioned be a reasonable means of preventing danger likely to arise from the breaking of the company's wires, it was the duty of the company to provide the guard, or see that it was provided, and a failure to do so was negligence. We are therefore of opinion that the finding of the jury holding both defendants guilty of negligence may be supported.

But the defendants insist that contributory negligence on the part of the boy was conclusively shown. At the time of the accident the boy was walking with a Mr. Moritz, who held an umbrella over them, as it was raining. The sidewalk was flagged in the center, but between the flagging and the curb was a space four to six feet wide, covered with grass. The man and boy walked on the flagging, the former being nearest the curb. As they approached the place of the accident, Mr. Moritz saw a line of small electric lights, about the size of a pea, in the grass, three or four inches from the curb. They extended ten or fifteen feet in length; but as they were not near the flagging, and no hindrance was perceived across the path, the man and boy went on, and then both received a shock, which knocked them down and killed the boy. Mr. Moritz swears that he could not see the wire, and we may assume that the boy did not; for, in the rain, the flagging and the wire lying upon it would scarcely differ in color, and the dusk of the evening would render discernment more improbable. These circumstances evidently presented questions as to the boy's negligence which fell within the province of the jury.

Lastly, the defendants object to the amount of damages. We are unable to see how, on any rational computation of probabilities, the pecuniary loss resulting from this boy's death can equal the present value of $5,000. For this reason, therefore, the verdict must be set aside, unless the plaintiff will reduce the damages to $2,000, in which event the rule for a new trial will be discharged.

KENNEDY v. SULLIVAN.

Supreme Court, New Jersey, February, 1901.

CHILD RUN OVER BY HORSE AND WAGON — NEGLIGENCE OF DRIVER — EVIDENCE. — In an action for injuries sustained to a child by being run over, a witness testified that just before the accident he saw the horse and cart coming down the street, and that the driver was sitting in the cart with his head resting on his chest; that plaintiff was at that time behind another wagon, and as defendant's cart passed the wagon it struck plaintiff, knocking him down. The driver of the cart testified that he was looking ahead, and that plaintiff ran right into him. *Held*, that the evidence justified the inference that defendant's driver was negligent (1).

ACTION by George F. Kennedy against Michael A. Sullivan. Judgment for plaintiff, and rule to show cause why a new trial should not be granted. *Rule discharged.*

Argued November term, 1900, before DEPUE, Ch. J., and DIXON, GUMMERE, and COLLINS, JJ.

RANDOLPH PERKINS, for plaintiff.

CHARLES C. KELLY, for defendant.

PER CURIAM. — The plaintiff recovered a verdict for personal injuries received by being run over by a horse and cart belonging to the defendant and driven by his employee. At the time of the occurrence of the accident the plaintiff was only three years and seven months old. By reason of his tender years the question of contributory negligence is out of the case, and the propriety of the verdict depends solely upon whether the evidence will support the conclusion that the accident was due to carelessness upon the part of the defendant's driver. The principal witness on the part of the plaintiff testified that just before the accident he saw the horse and cart coming down the street, and that the driver was sitting in the cart, with his head hanging down (his chin resting against his chest); that the plaintiff at that time was behind another wagon, belonging to one Percy, which was drawn up close to the sidewalk; and that, as the defendant's cart passed Percy's wagon, it struck plaintiff, knocked him down, and ran over him. The defendant's driver was the only witness produced on his behalf to speak to the happening of the accident. He testified that as he drove along the street he was watching ahead of him, and that the plaintiff ran right into him, and so was knocked down and run over. The jury evidently

1. For other "Run-over Cases," from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

believed the account of the accident as detailed by plaintiff's witness, and, this being so, they were justified in their inference that the defendant's driver was negligent in driving along the street with his head hanging down in the manner described by the witness, and that the plaintiff's injuries resulted from this careless manner of driving.

The rule to show cause should be discharged.

SHELLY v. BRUNSWICK TRACTION COMPANY.

Court of Errors and Appeals, New Jersey, March, 1901.

COLLISION BETWEEN TROLLEY CAR AND WAGON — DIRECTING VERDICT — EVIDENCE — INTOXICATION—CONTRIBUTORY NEGLIGENCE — INSTRUCTION. — 1. It is not error to refuse to direct a verdict for the defendant when there is evidence upon the question of the defendant's negligence and of the plaintiff's contributory negligence, in addition to that of the happening of the accident from which the defendant's liability may be fairly inferred.

2. Evidence that plaintiff was intoxicated on occasions previous to the accident is irrelevant and incompetent.

3. Where the proof of the intoxication of the plaintiff at the time of the accident depends upon the testimony of several witnesses as to various actions of the plaintiff from which intoxication might be inferred, a direction of the judge that the jury must find intoxication of the plaintiff before considering its effect upon the question of contributory negligence was proper.

4. The charge of the judge that "he [the motorman] says he took the risk; the company should not take risks;" and "he [meaning the plaintiff] had, you may say, a right to assume that a trolley car would not run into him," — taken in connection with the rest of the charge and the evidence in the case, — *held* proper (1).

(Syllabus by the Court.)

ERROR to Circuit Court, Middlesex County.

Action by John Shelly against the Brunswick Traction Company. From judgment for plaintiff, defendant brings error. *Judgment affirmed.*

WILLARD P. VOORHEES, for plaintiff in error.

GEORGE S. SILZER, for defendant in error.

GARRETSON, J. — The plaintiff recovered a judgment against the defendant for personal injuries received by him by reason of his wagon being run into from the rear by a trolley car of the defendant

1. For other actions relating to Collisions between Trolley Cars and Vehicles, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

as he was driving on the tracks of the company in the evening, and a reversal of that judgment is sought upon the grounds that the trial justice refused to direct a verdict for the defendant, excluded legal testimony, and erred in charging the jury. There was no motion to nonsuit, and it is necessary to consider all the testimony bearing upon the question of the negligence of the defendant and the contributory negligence of the plaintiff, in order to determine whether the case was properly left to the jury, or whether the court should have directed a verdict as requested. If these questions were fairly debatable, then their determination was properly left to the jury.

As to the negligence of the defendant, there were circumstances testified to beyond the mere fact of the happening of the accident. These circumstances bear upon the question of the exercise of reasonable care on the part of the defendant, and the control which the motorman had over his car. Such circumstances were the speed of the car, it being testified to by different witnesses. One witness says it was running along "at their regular rate of speed;" "generally fast;" "about their full speed." Another witness says, "going about five miles an hour;" and as bearing upon the speed of the car, and the motorman's control over the car, is the evidence of the distance traveled by the car after it struck the wagon, the distance the wagon and horse were thrown by the blow, the damage to the wagon and to the plaintiff from the blow, and the damage to the car. There is also evidence bearing upon the care exercised by the motorman, as to the degree of darkness at the place where the accident occurred, and as to the distance that the wagon could be seen, and was seen, by the motorman before it was struck. This left the negligence of the defendant to be determined by the jury.

The contributory negligence of the plaintiff had to be established by evidence; it could not be presumed. He was driving in a place where he had by law a right to drive, and was struck on the rear of his wagon by the defendant's car. This did not prove contributory negligence, and it was for the defendant to satisfy the jury, by evidence of action or want of action on his part, that he had contributed to the accident. The plaintiff's testimony was that he was driving on the track, and as soon as he heard the bell he looked back, and saw the car, and endeavored to get off the track. He succeeded in getting his horse off, and his wagon partially, when he was struck. The evidence of the motorman is that no such effort was made; that the plaintiff kept right on straight ahead, and the car struck the wagon right in between the hind wheels. The question of the contributory negligence of the plaintiff was properly left

to the jury, and the request to direct a verdict for the defendant was properly refused.

The evidence excluded was as to the intoxication of the plaintiff on other occasions than at the time of the accident. The plaintiff was asked these questions: "Have you ever had any trouble with the trolley cars before?" "Have you on previous occasions had the trolley cars stop by reason of your being on the track?" "Have you had your horse led off the track before this time by the employees of the trolley company?" A witness for the defendant, who had testified that he did not know whether the plaintiff was drunk at the time of the accident, was asked "Is he a man who gets drunk?" "Have you seen him intoxicated on numerous occasions?" And another witness for the defendant was asked: "What were his habits in regard to sobriety?" "Have you ever taken care of the plaintiff when he was in a state of intoxication?" "State whether or not you have seen the plaintiff on several occasions, within two or three months of this occurrence, in a state of intoxication." And the defendant's counsel, stating his purpose to be to prove that the plaintiff is of intemperate habits, so much so that he became helpless, and unable to take care of himself or his property, asked, "Have you frequently seen this plaintiff in a state of intoxication so that he was unable to take care of himself, and have you upon such occasions taken care of him and his team?" referring to occasions prior to the time of the accident. All of these questions were objected to and excluded, and exceptions taken. The evidence was not relevant. To prove that the plaintiff was intoxicated on previous occasions, or, as the defendant's counsel puts it in his brief, was addicted to the use of intoxicating liquors, would not prove that he was intoxicated at the time of the accident, and to show that on previous occasions of intoxication he was in a helpless condition would not tend to show that on the occasion in question he was intoxicated to such a degree as to be helpless. It has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged. Tayl. Ev. 251; 1 Greenl. Ev. (16th ed.) sec. 146. The issue upon this part of the case was the negligence of the plaintiff, not his intoxication; it did not matter whether he was drunk or sober. If the defendant had shown that the plaintiff was in the habit of becoming intoxicated, and that when intoxicated he became helpless, that would not have shown contributory negligence. It would have been necessary to go still further, and prove that the acts of commission or omission which caused the accident were negligent ones. Such proof is an effort to account for the acts of the

plaintiff, but is not proof of the acts themselves. Such evidence would introduce into the case collateral issues which were not raised by the pleadings. In Kingston *v.* Railroad Co. (Mich.) 70 N. W. Rep. 315, it was held to be error to permit defendants to introduce testimony showing that two or three years prior to that time tne plaintiff was in the habit of becoming intoxicated. Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. Rep. 534; Heland *v.* City of Lowell, 3 Allen, 407; Warner *v.* Railroad Co., 44 N. Y. 465; Thompson *v.* Bowie, 4 Wall. 463; Jackson *v.* Smith, 7 Cow. 719.

The defendant's counsel requested the court to charge the jury: "If the jury believe that the plaintiff was intoxicated, and that by the exercise of ordinary prudence could have avoided the accident if sober, he is guilty of contributory negligence, and cannot recover;" "that if the accident were partly due to the intoxication of the plaintiff he cannot recover;" and the judge charged as requested, and followed with this caution: "But you must find before you can take up the consideration of these requests that he was intoxicated. It must not be conjecture on your part or guesswork. It does not follow that because a man sang in his wagon, or asked perhaps foolish questions of passers-by, or that his breath smelled of liquor, that he was intoxicated. That is some evidence of the fact, but you must find, in order to invoke the law of these requests, that he was intoxicated, and that that intoxication contributed to the accident, — that is, that a sober man would not have been hurt," — and it is upon this statement that error is assigned. The judge thereby did not state any rule of law different from that contained in the requests to charge, and it no more than pointed out to the jury by a recital of the evidence to what extent intoxication should be proved in order to show how far it affected the plaintiff's acts of alleged negligence. We think there was no error in this part of the judge's charge.

Error is also assigned to a statement in the charge of the judge in which the court says: "He (the motorman) says he took the risk; the company should not take risks." This expression by the judge, taken in connection with the rest of the charge, and with all the evidence in the case on that subject, was unobjectionable. The motorman had testified that it was a very dark night; that there were trees along the road on the edge of the sidewalk; that the foliage is such that the top of a wagon can just get under nicely; that he was running about five miles an hour; that he saw the plaintiff's wagon ahead of him; that he put on his brake, and kept ringing his bell, and thought that the plaintiff would get off in time, so he kept on to see if he would get clear; that he did not notice that

the plaintiff was turning; that he thought he would get off by the time he got close to him; and he then testified as follows: "Q. How was it, if this was such a dark hole, that you did not come down to a low speed as you went through it? A. I was down to a low speed. Q. There was a lower speed? A. Yes, sir. Q. You can run less than five miles an hour? A. Yes, sir. Q. You knew that this was a dark and dangerous place, and that somebody might be under those trees. Why did you not pull down the car, and go slowly, so you would not hit any one? A. I was running the risk of that. I was going along and looking ahead to see that there was no danger ahead. Q. You ran the risk; if there did happen to be somebody, then you would have to take your chance? A. I would have to stop my car. Q. And the result of which was that Shelly was hit? A. Yes, sir." It seems quite clear that the motorman was substituting what he calls "running the risk" for the exercise of that care which the law requires. He did not reduce his speed below which he was running or get his car so under control that it could be promptly stopped if any one appeared on the track ahead, but he continued on his course without taking into consideration the possible danger of some one being on the track, and assuming that the track was clear; in other words, basing his action on a clear track. He took the risk of some one being on the track ahead; that is, he excluded that chance from the consideration of the way in which he should manage his car. This, of course, he had no right to do.

Error is also assigned upon that part of the judge's charge in which he says: "He (meaning the plaintiff) had, you may say, a right to assume that a trolley car would not run into him." This is only a part of a sentence, and is taken out of a paragraph of the charge dealing with the question of the plaintiff's contributory negligence and his right in the highway. When read in connection with the whole paragraph, we see nothing in it which lays down any rule of law different from those established by the decisions of this court. It was no more than a statement to the jury that the plaintiff might assume that the trolley company having equal rights with him, and he having equal rights with them, in the public highway, would so exercise those rights as not to do damage to him. Railroad Co. *v.* Preston, 59 N. J. Law, 264, 35 Atl. Rep. 1119; Consolidated Traction Co.. *v.* Haight, 59 N. J. Law, 577, 2 Am. Neg. Rep 192, 37 Atl. Rep. 135.

The judgment should be affirmed.

FIVEY v. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, New Jersey, February, 1901.

PLEADING — PAROL CONTRACT DISCHARGING LIABILITY FOR NEGLIGENCE — FRAUD. — In an action for a tort, the defendant pleaded a parol contract by the plaintiff discharging the defendant from liability, and the plaintiff replied that the contract had been obtained from him by fraud and deceit on the part of the defendant. *Held*, on demurrer, that the general averment of fraud, without setting forth the particulars, was sufficient. (Syllabus by the Court.)

ACTION by Patrick Fivey against the Pennsylvania Railroad Company. Demurrer to reply overruled.

Argued November term, 1900, before DEPUE, Ch. J., and GUMMERE, COLLINS, and DIXON, JJ.

MCEWAN & MCEWAN, for plaintiff.

JAMES B. VREDENBURGH, for defendant.

DIXON, J. — In an action for personal injuries alleged to have been caused by the negligence of the defendant, the latter pleaded a parol agreement, discharging the defendant from liability. To this plea the plaintiff replied (among many irrelevant allegations) that the said agreement was obtained from him by fraud and deceit on the part of the said defendant. Thereupon the defendant demurred. The question for decision is whether this general averment of fraud constitutes a legal answer to the plea. At common law, in pleading fraud for the purpose of avoiding a specified transaction, it seems to have been permissible to allege fraud generally, without setting forth the particulars. It was so determined in Tresham's Case, 9 Coke, 108, in which the defendant was sued as administratrix on the bond of her intestate, and pleaded that there were certain debts of record, which had been acknowledged by her intestate, and that she had fully administered the assets, except goods and chattels, to the value of said debts. To this the plaintiff replied that, as to one of those debts, it had been paid by the intestate, but was kept undischarged and uncanceled on the record by the fraud and covin of the defendant, with the intention of defrauding the plaintiffs of their just debt. On demurrer, the court resolved that the general averment of fraud and covin was sufficient, "because covin is so secret, whereof by intendment another man cannot have knowledge." On the authority of this case, and dicta of the judges in Hill *v.* Montagu, 2 Maule & S. 377, Chitty considers such pleading to be lawful, for the reason above indicated (1 Chit. Pl. 537),

and gives forms of plea and replication in accordance therewith, even for the purpose of defeating specialties. So, in Evans *v.* Edmonds, 13 C. B. 777, the defendant pleaded that he had been induced to enter into and make the covenant sued on through and by means of the fraud and covin of the plaintiff, and on this plea, after full consideration, he obtained a verdict and judgment. The earlier cases in this State are to the same effect. Thus, in Mason *v.* Evans, 1 N. J. L. 182, this court distinctly upheld a plea that the bond sued on was obtained by fraud, without setting forth the nature of the fraud. So, in Barrow *v.* Bispham, 11 N. J. L. 110, in framing an issue under direction of this court to try whether a certain bond had been obtained by fraud, covin, and misrepresentation, the pleadings set out no particulars of the deceit. But when it became settled in this State, by the cases of Rogers *v.* Colt, 21 N. J. L. 19, 704, and Stryker *v.* Vanderbilt, 25 N. J. L. 482, that fraud in the consideration of a contract under seal formed no defense at law, then it logically followed, and was so adjudged in Hudson *v.* Inhabitants of Winslow, 35 N. J. L. 437, and Connor *v.* Chemical Works, 50 N. J. L. 257, 12 Atl. Rep. 713, that a pleading which merely averred that a sealed instrument had been obtained by fraud, without specifying the nature of the fraud, was bad; the reason being that such a pleading left it uncertain whether the fraud was in the execution of the instrument, or only in the consideration, and in the latter case it would not defeat the specialty. As sealing and delivery only were needed to constitute a valid deed, a fraud which did not in legal theory vitiate those acts left the deed unimpaired, and it was therefore legally immaterial that fraud had tainted some other part of the transaction.

But, with regard to parol contracts, the case is different. In them not only is execution of the agreement necessary, but a consideration is likewise requisite for their validity, and therefore, if either the consideration or the execution be annulled by fraud, the contract is defeated. Hence the reason which dictated for New Jersey a modification of the common law rule as to the mode of pleading fraud to defeat a specialty is inapplicable to parol contracts, and as to them the common-law rule must prevail, that fraud may be pleaded generally, without setting forth the particulars. A corresponding rule obtains with regard to a general demurrer upon a declaration for negligence. Van Horn *v.* Railroad Co., 38 N. J. L. 133 (1); Breese *v.* Railroad Co., 52 N. J. L. 250, 19 Atl. Rep. 204 (2); Race

1. Van Horn *v.* Central R. R. Co. of N. J., 38 N. J. L. 133, is reported in 5 Am. Neg. Cas. 13.

2. Breese *v.* Trenton Horse R. R. Co., 52 N. J. L. 250, is reported in 5 Am. Neg. Cas. 31.

v. Railroad Co., 62 N. J. L. 536, 41 Atl. Rep. 710. As such a demurrer confesses that the defendant's negligence was the cause of the plaintiff's injury, the particulars of the negligence become unimportant. Similarly unimportant are the particulars of the fraud, when the party who pleads a parol contract confesses that his fraud induced the contractor to make it. The plaintiff is entitled to judgment on this demurrer.

BURKE v. IRELAND.

Court of Appeals, New York, March, 1901.

COLLAPSE OF BUILDING — OWNER NOT LIABLE FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR. — In an action to recover damages for the death of plaintiff's intestate caused by the collapse of a building owned by defendant, the deceased being engaged as a plasterer in the employ of a sub-contractor who had charge of that part of the work upon the building which was in course of construction, it was held that defendant was not liable where it appeared that defendant employed a competent architect to draw plans for the building and contracted with a competent contractor to erect the building according to the plans, and that the accident was caused by the builder's foreman deviating from the plans and building an insecure foundation under one of the columns supporting the beams and girders of the building (1).

APPEAL from a judgment of the Supreme Court, New York, Appellate Division, Second Department, affirming a judgment entered upon the verdict of a jury. The facts are stated in the opinion. *Judgment reversed.*

CHARLES F. BROWN, for appellant.

CHARLES J. PATTERSON, for respondent.

O'BRIEN, J. — The judgment in this case imputes personal negligence to the defendant Ireland, resulting in the death of the plaintiff's intestate. The important question presented by the appeal is whether this conclusion is justified by the undisputed facts. It is insisted on behalf of the defendant, who has appealed from the judgment, that the recovery has been had upon different grounds than those alleged in the complaint; and, also, it is contended that there should be a reversal upon exceptions taken to the refusal of the

1. On the question of liability for negligence of independent contractor, see Berg *v.* Parsons, 156 N. Y. 109, 4 Am. Neg. Rep. 432; Wolf *v.* American Tract Society, 164 N. Y. 30, 8 Am. Neg. Rep. 296, and Uppington *v.* Mayor, etc., 165 N. Y. 222, 9 Am. Neg. Rep. 115, in each of which cases the question is somewhat fully discussed and the New York and other authorities reviewed.

learned trial judge, at the request of the defendant's counsel, to charge certain propositions of law. In the view which we are inclined to take of the case it is not necessary to consider these points of the argument, since if there were any facts established for the consideration of the jury we would not be disposed to interfere with the judgment upon any nice questions of practice, or to subject the charge and the requests to a very close analysis, for in the main the proceedings at the trial, including the charge, were regular, and it may be, so far as these exceptions are concerned, correct. The real question is whether there was any proof in the case which could justify the finding by the jury of personal negligence on the part of the defendant which was the proximate cause of the accident. If there was not, the other questions in the case are of no importance.

On the 8th day of August, 1895, the plaintiff's husband, the intestate, was killed while engaged at his occupation as a plasterer, upon a building which was being erected by the defendant. The deceased, at the time of his death, was in the employ of a subcontractor who had charge of that part of the work. It appears from the record that the defendant was the owner of a plot of land on the northeast corner of West Third street and West Broadway, in the city of New York, and during the latter part of the year 1894 he resolved to erect a large commercial building thereon, eight stories in height. He employed a competent architect to draw the plans for the building with the necessary specifications, which were submitted to and approved by the building department of the city after an examination of the land upon which the building was to be erected, in connection with the plans. There is no suggestion in the record that this architect was incompetent to perform the duty for which he had been employed. The defendant then entered into a contract with a party to excavate the cellar for the building and into another contract with a competent builder to erect the building for a stated price. Both of these contracts were in writing and appear in the record. In each of them it was provided that the work should be done according to the plans and specifications of the architect, which were made a part of the contract, and it was stated that "the specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications, without any extra charge whatsoever," and the same provision was inserted as a general condition in the specifications. The contract for the excavation required the contractor to do all digging and

v. Railroad Co., 62 N. J. L. 536, 41 Atl. Rep. 710. As such a demurrer confesses that the defendant's negligence was the cause of the plaintiff's injury, the particulars of the negligence become unimportant. Similarly unimportant are the particulars of the fraud, when the party who pleads a parol contract confesses that his fraud induced the contractor to make it. The plaintiff is entitled to judgment on this demurrer.

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APPEAL from a judgment of the Supreme Court, New York, Appellate Division, Second Department, affirming a judgment entered upon the verdict of a jury. The facts are stated in the opinion. *Judgment reversed.*

CHARLES F. BROWN, for appellant.

CHARLES J. PATTERSON, for respondent.

O'BRIEN, J. — The judgment in this case imputes personal negligence to the defendant Ireland, resulting in the death of the plaintiff's intestate. The important question presented by the appeal is whether this conclusion is justified by the undisputed facts. It is insisted on behalf of the defendant, who has appealed from the judgment, that the recovery has been had upon different grounds than those alleged in the complaint; and, also, it is contended that there should be a reversal upon exceptions taken to the refusal of the

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learned trial judge, at the request of the defendant's counsel, to charge certain propositions of law. In the view which we are inclined to take of the case it is not necessary to consider these points of the argument, since if there were any facts established for the consideration of the jury we would not be disposed to interfere with the judgment upon any nice questions of practice, or to subject the charge and the requests to a very close analysis, for in the main the proceedings at the trial, including the charge, were regular, and it may be, so far as these exceptions are concerned, correct. The real question is whether there was any proof in the case which could justify the finding by the jury of personal negligence on the part of the defendant which was the proximate cause of the accident. If there was not, the other questions in the case are of no importance.

On the 8th day of August, 1895, the plaintiff's husband, the intestate, was killed while engaged at his occupation as a plasterer, upon a building which was being erected by the defendant. The deceased, at the time of his death, was in the employ of a subcontractor who had charge of that part of the work. It appears from the record that the defendant was the owner of a plot of land on the northeast corner of West Third street and West Broadway, in the city of New York, and during the latter part of the year 1894 he resolved to erect a large commercial building thereon, eight stories in height. He employed a competent architect to draw the plans for the building with the necessary specifications, which were submitted to and approved by the building department of the city after an examination of the land upon which the building was to be erected, in connection with the plans. There is no suggestion in the record that this architect was incompetent to perform the duty for which he had been employed. The defendant then entered into a contract with a party to excavate the cellar for the building and into another contract with a competent builder to erect the building for a stated price. Both of these contracts were in writing and appear in the record. In each of them it was provided that the work should be done according to the plans and specifications of the architect, which were made a part of the contract, and it was stated that "the specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications, without any extra charge whatsoever," and the same provision was inserted as a general condition in the specifications. The contract for the excavation required the contractor to do all digging and

deceased or the public. The court also charged the jury that the plans and specifications were devised by a competent architect, and it is not claimed that the builder was incompetent. The controversy, therefore, is reduced to very narrow limits, since it is a question as to how far the defendant can be held responsible for a defect in the work resulting from the omission of the builder to perform his contract.

The owner of real property in a city holds it subject to such reasonable police regulations with respect to its use as may be necessary for the health, safety or convenience of the public. Subject to these restrictions he has the right to use his land for building purposes, and, unless he is guilty of some personal negligence in the use or enjoyment of the property which endangers the safety of others, he cannot be held responsible for the results of accidents. In this case the owner was not competent himself to plan the building which he desired to erect. He was not competent to construct or superintend the construction. If he had attempted to do any of these things it may be that he could be held responsible for the results of the accident. It was his duty to devolve these things upon persons possessing sufficient knowledge and skill to accomplish the result intended, with safety to the workmen and the public. Accordingly he employed a competent architect to draw the plans and specifications for the building, which were approved by that department of the city government which had charge of the matter. It cannot be said that he interfered with the plans or reserved or exercised any right to change them. In other words, he committed the whole matter to a competent expert. The work of constructing the building including the foundations, he also committed to a competent contractor, but whose foreman made the mistake of placing the central column, which supported the upper part of the building, upon an insecure foundation. This mistake was the direct or proximate cause of the accident in which the plaintiff's intestate lost his life. It produced such distressing results that it is natural to seek relief for the families of the unfortunate victims from some source.

The learned counsel for the plaintiff has presented to us an argument in support of this judgment which illustrates the capacity of the human intellect to reason and argue in support of a cause which very properly enlists human sympathy. We have considered this argument in all its bearings with all the care that the great importance of the case seems to require. As a professional effort, in which skill and learning, combined with great reasoning powers, have been displayed, it cannot be too highly commended. The

difficulty is that it leads to a conclusion that cannot be accepted by the court without overthrowing established principles which are vital for the reasonable protection and security of every owner of real estate. If the principle contended for should receive the sanction of this court, it would be very difficult, if not impossible, for any owner of land in a great city to use it for building purposes without subjecting his entire estate to such enormous hazards as would virtually amount to a prohibition of such use. When the argument is considered in its entire scope and tendency, the plain conclusion is that the defendant could not devolve upon either architects or contractors the duty of preparing the foundations of the column which gave way, so as to escape responsibility for the results of the accident. It would not be possible, without extending the discussion beyond all reasonable limits, to answer the several propositions from which the learned counsel for the plaintiff has deduced his general conclusion.

It is quite sufficient to say that they all proceed from a principle of duty and responsibility on the part of the owner that is not warranted by the rules of law applicable to the case. If it is true that the owner was bound at his peril to see to it that the foundation of the iron column was laid upon solid ground, then it would be difficult to avoid the conclusion that the result of the accident could be attributed to the omission of the defendant in that respect. But we think that this was an obligation which the owner could devolve upon an independent contractor, and it requires only a fair construction of the contract to show that it was placed upon the builder, for whose omissions or mistakes the defendant is not responsible. There is no proof in the case from which the jury could find that the accident resulted from any defect in the plan. The death of the plaintiff's intestate was caused by a defective execution of the plan which the contractor agreed to carry out. The central column, which was intended to support the building, was placed upon an unsafe foundation, and this was the direct or proximate cause of the calamity. If the architect, who had general supervision, had insisted upon a careful inspection of every detail of the work, and had been present when the concrete was about to be laid upon the disturbed ground outside the old cistern wall, he might have discovered the departure from the terms of the contract in that respect and prevented it. But the architect was not the agent or servant of the owner. He was in the exercise of an independent calling and held the same legal relations to the defendant that the builder did, and for the omissions of either in the execution of the plans, personal negligence cannot be imputed to the defendant. Stryker

v. Cassidy, 76 N. Y. 50; Lake *v.* McElfatrick, 139 N. Y. 349; Dodge *v.* McDonald, 14 Wis. 553; Lottman *v.* Bonnett, 62 Mo. 159. The responsibility of an owner of land engaged in improving it, or building upon it, through an independent contractor, for accidents such as the record discloses in this case is well settled. While it may be that none of the cases in this court presented such serious and distressing consequences of an accident as the one now before us, the decisions establish certain principles which preclude a recovery against the owner on the undisputed facts of the case.

It will be seen from an examination of these cases that they determine principles which, when applied to the facts of this case, are fatal to the judgment. Pack *v.* Mayor, etc., 8 N. Y. 222; Kelly *v.* Mayor, etc., 11 N. Y. 432; McCafferty *v.* S. D. & P. M. R. R. Co., 61 N. Y. 178; King *v.* N. Y. Central & H. R. R. R. Co., 66 N. Y. 181; Charlock *v.* Freel, 125 N. Y. 357; Engle *v.* Eureka Club, 137 N. Y. 100; Negus *v.* Becker, 143 N. Y. 303; Vogel *v.* Mayor, etc., 92 N. Y. 10; Herrington *v.* Lansingburgh, 110 N. Y. 145; Berg *v.* Parsons, 156 N. Y. 109, 4 Am. Neg. Rep. 432; Wolf *v.* American Tract Society, 164 N. Y. 30, 8 Am. Neg. Rep. 296; Uppington *v.* Mayor, etc., 165 N. Y. 222, 9 Am. Neg. Rep. 115. The defendant undertook to erect a building on his own land in a proper and the usual way. He omitted nothing that can be made the basis of a charge of personal negligence in going about the undertaking. He took all such measures to construct the building that any reasonably prudent man would under the same circumstances. No one could reasonably anticipate or guard against the unfortunate result, except the experts employed to plan and erect the building. After a careful examination of the case we can see only a most sad and unfortunate accident for the result of which the defendant within acknowledged principles of law cannot be held liable.

The judgment should, therefore, be reversed, and a new trial granted; costs to abide the event.

PARKER, CH. J., GRAY, HAIGHT, LANDON and WERNER, JJ., concur; CULLEN, J., not sitting.

GIRVIN v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Court of Appeals, New York, March, 1901.

EJECTING TRESPASSING BOY FROM FREIGHT TRAIN — ASSAULT BY BRAKEMAN AFTER EJECTING THE BOY — SCOPE OF EMPLOYMENT — QUESTION FOR JURY. — In an action to recover damages for injuries to a boy, fourteen years of age, who was assaulted by defendant's brakeman, it appeared that the boy was stealing a ride on defendant's freight train; that the brakeman chased him on the train and was about to grab him when he jumped from the train, and the brakeman also jumped from the car on top of him, striking him before he reached the ground, and broke his leg. *Held*, that whether the assault was commenced before the brakeman left the car, thus acting within the scope of his employment rendering defendant liable for his acts, was for the jury to determine (1).

1. See former decision in the Appellate Division of the Supreme Court, 8 AM. NEG. REP. 107.

For actions relating to Assaults upon and Ejection of Persons from Trains, Street Cars, etc., see vol 8 Am. Neg. Cas., where the same are chronologically grouped, from the earliest period to 1897, and arranged in alphabetical order of States. Subsequent actions to date, on the same topics, appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

As to liability of master for act of servant in assaulting a person, see the following recent cases:

In BOYER ET AL. *v.* COXEN *(Maryland, January, 1901)*, 48 Atl. Rep. 161, the question whether there was evidence sufficient to justify an instruction as to punitive or exemplary damages was decided in the affirmative, judgment for plaintiff being affirmed on the following facts (as *per* opinion by BOYD, J.): " In this case the jury was required to find that the agent, McKewen, was acting in the discharge of his duty for which he was employed when he made the assault complained of, before it could render a verdict for the plaintiff, and, having so found, his principal was responsible in punitive damages, provided the facts were such as would have warranted that kind of damages if the agent were being sued. It therefore becomes necessary to see what the record discloses with reference to the character of the assault alleged to have been made on the plaintiff, and, in passing on this prayer, we must accept the testimony offered by the plaintiff as true. Coxen went to market with a load of peas, which a commission merchant named Koppelman examined and accepted. He directed Coxen to take them to the packing house of the defendants. After waiting there for two or three hours for his turn to deliver the peas, he gave a ticket which he had received from Koppelman to a measurer, who gave it to McKewen, and commenced to unload the peas. He emptied a sack of them on the floor, and, after looking at them, said to the plaintiff: " We won't have those peas; you will have to go back to the market." The plaintiff replied that the buyer at the market had examined them thoroughly, and the measurer then referred him to the foreman (McKewen), who refused to take them. Coxen then asked him to call up the

APPEAL from Supreme Court, New York, Appellate Division, Fourth Department.

Action by William J. Girvin, by Frank E. Wade, his guardian *ad litem*, against the New York Central and Hudson River Railroad Company. From a judgment of the appellate division (8 Am. Neg.

buyer, said he had been waiting there all morning, and he was not going back until the buyer was called. McKewen ordered him to move on, and went to his horse's head, and Coxen went on the other side, and told him not to move the horse. McKewen said he would have him arrested, walked out to West Falls avenue, as if he was looking for an officer, and went back to the packing house, and came out with a monkey wrench in his hand. According to the testimony of the plaintiff, McKewen struck him over the head with the monkey wrench, which was eighteen inches long, and some of the witnesses said McKewen struck him over the head several times, and other parties took hold of him. Coxen's nose was broken. He bled very profusely, and was quite seriously injured. McKewen testified that he did not strike Coxen until after he had struck him; that he started to move the horse in order to clear the way for other teams, when Coxen struck him, and then he got the monkey wrench; and there was some testimony to corroborate him in these statements. But, if the testimony of the plaintiff and his witnesses be true, McKewen made the first assault, and did so in such manner as unquestionably authorized the jury to award exemplary damages. Although Coxen was not free from blame, it was not a wholly unreasonable demand that he made to have McKewen call up Koppelman, who had purchased the peas for the defendants after inspecting them. But, according to Coxen, McKewen not only refused to do so, but made the assault on him without any cause, excepting that Coxen would not move on with his team, and inflicted serious injuries upon him. It was for the jury to determine between the witnesses, and, judging from the verdict, they evidently accepted the plaintiff's account of the difficulty."

In BROWN *v.* BOSTON ICE CO. AND LYDSTON *v.* BOSTON ICE CO. (*Massachusetts, March, 1901*), 59 N. E. Rep. 644, the case was stated by LORING, J., as follows: "The ground on which the plaintiffs contend that the defendant is liable for Sprague's acts in beating them with the handle of the ice ax is that, from what Sprague said at the time, the jury were warranted in finding that he punished them, in whole or in part, for the purpose of making it easier for him to deliver ice from the defendant's ice cart in the future, without an assistant, and with slight care of the tools; and therefore the case is brought within Howe *v.* Newmarch, 12 Allen, 49. But in this case Sprague's attack on the boys was an act of punishment inflicted for a past injury to his master's property, and not in doing an act which he had to do if he performed the duty owed by him to his master. It is not within the scope of the authority of a servant to whose custody his master's property has been confided to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past. The case comes within Bowler *v.* O'Connell, 162 Mass. 319, 38 N. E. Rep. 498; Driscoll *v.* Scanlon, 165 Mass. 348, 43 N. E. Rep. 100; and in some aspects is like Porter *v.* Railroad Co., 41 Iowa, 358; Candiff *v.* Railway Co., 42 La. Ann. 477." Plaintiff's exceptions to judgment for defendant overruled.

Rep. 107, 52 App. Div. 562, 65 N. Y. Supp. 299) reversing a judgment in favor of defendant, entered on a dismissal of the complaint, and an order denying a motion for a new trial, defendant appeals. *Judgment affirmed.*

A. H. COWIE, for appellant.

WILLIAM NOTTINGHAM, for respondent.

HAIGHT, J. — This action was brought to recover damages for a personal injury alleged to have been caused by the negligence of the defendant. The plaintiff was a boy fourteen years of age, and, with other boys, was engaged in stealing a ride upon one of the defendant's freight trains. The evidence tends to show that he, with other boys, boarded the train while it was standing at the station in Solvay, and just as the train was starting he discovered a brakeman coming over a box car onto the flat car occupied by him. The brakeman halloed at him and ran after him. The plaintiff tells us that he ran to the end of the car, jumped onto another flat car, ran across that, and was going to jump onto a box car ahead, but, finding the brakeman had overtaken him and was about to grab him, he jumped from the train, and that as he jumped the brakeman also jumped from the car on top of him, striking him before he reached the ground, and broke his leg. He then tells us that the brakeman kicked him, and raised him up and struck him in the face five or six times, and then left him, and jumped back onto the train. The rule of liability governing cases of this character is well stated in the case of Mott *v.* Ice Co., 73 N. Y. 543. It is that "for the acts of a servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully. * * * But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible." The instant that the train started the duty of the brakeman was upon the train. He undoubtedly acted within the scope of his employment in driving the plaintiff and other boys from the train. If he left the train, and committed an assault upon the plaintiff thereafter, he went outside of his employment, and he alone became liable for his malicious acts and wanton trespass. But in this case we are inclined to the view that the jury might have found that the assault upon the plaintiff commenced on the car before they had left the train. It may be that the brakeman had not, at the time the boy sprang from the car, actually seized hold of him, but the

brakeman was pursuing him as fast as he could run, in a threatening manner, with his hands nearly upon him, so that he came in physical contact with him before striking the ground. If the assault was commenced before leaving the car, the brakeman was acting within the scope of his employment, and the defendant became liable for his acts. We think, therefore, that the question was for the jury, and that the nonsuit was properly reversed by the appellate division. The order appealed from should be affirmed, and judgment absolute ordered for the plaintiff on the stipulation, with costs.

PARKER, CH. J., and O'BRIEN, CULLEN and WERNER, JJ., concur. LANDON, J., dissents. GRAY, J., not sitting.

Ordered accordingly.

DONNELLY v. CITY OF ROCHESTER.

Court of Appeals, New York, March, 1901.

FALLING INTO AREAWAY ON SIDEWALK — NOTICE OF DANGER. — In an action to recover damages for the death of plaintiff's intestate caused by falling into an areaway which extended along the sidewalk in front of a building, and was insufficiently guarded, it was *held* that the areaway having existed for so long a period of time as to render it a source of danger to persons on the street, the municipality was chargeable with knowledge of the danger (1).

INSUFFICIENTLY GUARDED AREAWAY — QUESTION FOR JURY. — The question whether a railing two and a half feet high was a sufficient protection to persons passing along a street of a city against falling into an areaway which extended some distance along the sidewalk, was for the jury to determine.

APPEAL from Supreme Court, New York, Appellate Division, Fourth Department.

Action by Patrick Donnelly, as administrator of Patrick H. Donnelly, deceased, against the City of Rochester. From a judgment of the appellate division (58 N. Y. Supp. 1140) overruling plaintiff's exceptions ordered to be heard in the first instance by such division, denying a motion for a new trial, and directing judgment for defendant, plaintiff appeals. *Judgment reversed.*

GEORGE H. HARRIS and JOHN S. KEENAN, for appellant.

PORTER M. FRENCH, for respondent.

1. For other actions against Municipal Corporations arising out of Accidents in Dangerous Places on Sidewalks, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of REPORTS. See, also, Note at end of this case.

CULLEN, J. — This action is brought to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant. In front of the Powers building, on Main street, the principal business street in the city of Rochester, there was an area way which extended into the street six feet four inches, and was twelve feet three inches below the grade of the sidewalk. The descent from the sidewalk to the level of the area was vertical. The excavation was at the time of the accident, the subject of this suit, guarded by a railing two feet and a half high, erected along the edge of the sidewalk. On the evening of January 29, 1897, the plaintiff's intestate, who had been standing on the sidewalk near the railing, started to walk across it to take an approaching car. He slipped on some snow which had recently fallen, and was precipitated over the railing into the area way. The area way and railing had existed for a number of years in the same condition as at the time of the accident. On the trial the plaintiff put in evidence an ordinance of the City of Rochester which prescribed that cellar ways or openings, platforms, or approaches to any building should have a substantial rail on the sides thereof at least three and a half feet high. At the conclusion of the evidence for the plaintiff the complaint was dismissed, and the judgment entered on such dismissal has been affirmed by the appellate division of the Supreme Court.

This action is not brought to impose liability upon the city for failing to enforce its ordinances, but for default in its own primary duty to maintain its streets reasonably safe and secure for travelers thereon. Nor, on the other hand, do we consider the area way to have been necessarily an unlawful encroachment upon the highway, and a nuisance *per se*. Subdivision 7 of section 6 of the amended charter of the City of Rochester (chapter 561, Laws 1890) authorizes the common council "to regulate and prevent the use and cumbering of streets, avenues," etc. While the right to excavate area ways or construct stoops in the highway is not an incident to the ownership of the adjacent land, a long usage of the highway for such purposes justifies the inference that the municipal authorities have consented to the presence of such structures on the highway, and "it is competent for the legislature to authorize a limited use of sidewalks in front of buildings in cities and villages for stoops or cellar openings, or underground vaults, for the more convenient and beneficial enjoyment of the adjacent premises." Jorgensen *v.* Squires, 144 N. Y. 280, 39 N. E. Rep. 373. See Broadbelt *v.* Loew, 15 App. Div. 343, 44 N. Y. Supp. 159, affirmed on opinion below in 162 N. Y. 642, 57 N. E. Rep. 1105. The gist of this action is

v. Railroad Co., 62 N. J. L. 536, 41 Atl. Rep. 710. As such a demurrer confesses that the defendant's negligence was the cause of the plaintiff's injury, the particulars of the negligence become unimportant. Similarly unimportant are the particulars of the fraud, when the party who pleads a parol contract confesses that his fraud induced the contractor to make it. The plaintiff is entitled to judgment on this demurrer.

BURKE v. IRELAND.

Court of Appeals, New York, March, 1901.

COLLAPSE OF BUILDING — OWNER NOT LIABLE FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR. — In an action to recover damages for the death of plaintiff's intestate caused by the collapse of a building owned by defendant, the deceased being engaged as a plasterer in the employ of a sub-contractor who had charge of that part of the work upon the building which was in course of construction, it was held that defendant was not liable where it appeared that defendant employed a competent architect to draw plans for the building and contracted with a competent contractor to erect the building according to the plans, and that the accident was caused by the builder's foreman deviating from the plans and building an insecure foundation under one of the columns supporting the beams and girders of the building (1).

APPEAL from a judgment of the Supreme Court, New York, Appellate Division, Second Department, affirming a judgment entered upon the verdict of a jury. The facts are stated in the opinion. *Judgment reversed.*

CHARLES F. BROWN, for appellant.

CHARLES J. PATTERSON, for respondent.

O'BRIEN, J. — The judgment in this case imputes personal negligence to the defendant Ireland, resulting in the death of the plaintiff's intestate. The important question presented by the appeal is whether this conclusion is justified by the undisputed facts. It is insisted on behalf of the defendant, who has appealed from the judgment, that the recovery has been had upon different grounds than those alleged in the complaint; and, also, it is contended that there should be a reversal upon exceptions taken to the refusal of the

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learned trial judge, at the request of the defendant's counsel, to charge certain propositions of law. In the view which we are inclined to take of the case it is not necessary to consider these points of the argument, since if there were any facts established for the consideration of the jury we would not be disposed to interfere with the judgment upon any nice questions of practice, or to subject the charge and the requests to a very close analysis, for in the main the proceedings at the trial, including the charge, were regular, and it may be, so far as these exceptions are concerned, correct. The real question is whether there was any proof in the case which could justify the finding by the jury of personal negligence on the part of the defendant which was the proximate cause of the accident. If there was not, the other questions in the case are of no importance.

On the 8th day of August, 1895, the plaintiff's husband, the intestate, was killed while engaged at his occupation as a plasterer, upon a building which was being erected by the defendant. The deceased, at the time of his death, was in the employ of a subcontractor who had charge of that part of the work. It appears from the record that the defendant was the owner of a plot of land on the northeast corner of West Third street and West Broadway, in the city of New York, and during the latter part of the year 1894 he resolved to erect a large commercial building thereon, eight stories in height. He employed a competent architect to draw the plans for the building with the necessary specifications, which were submitted to and approved by the building department of the city after an examination of the land upon which the building was to be erected, in connection with the plans. There is no suggestion in the record that this architect was incompetent to perform the duty for which he had been employed. The defendant then entered into a contract with a party to excavate the cellar for the building and into another contract with a competent builder to erect the building for a stated price. Both of these contracts were in writing and appear in the record. In each of them it was provided that the work should be done according to the plans and specifications of the architect, which were made a part of the contract, and it was stated that "the specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications, without any extra charge whatsoever," and the same provision was inserted as a general condition in the specifications. The contract for the excavation required the contractor to do all digging and

premises to a tenant who had sole use of the grating, and there was no covenant on the part of the owner to repair. It would be otherwise if the whole of the premises were leased to and in the possession of the tenant, as the duty to keep such a grating in repair runs with the land.

For other actions relating to the right of recovery over, see Armstrong County *v.* Clarion County, 66 Pa. St. 218; Malden, etc., R. Co. *v.* City of Charlestown, 8 Allen, 245; City of Buffalo *v.* Holloway, 7 N. Y. 493 (city not entitled to recover from its contractor damages it was compelled to pay to person injured by falling into public sewer, unless contract imposed duty of guarding the excavation); City of New York *v.* Brady, 81 Hun, 440 (contractor held liable to city for damages paid by it for injury to person falling into unguarded sewer excavation); City of Rochester *v.* Montgomery, 72 N. Y. 65; Campbell *v.* Somerville, 114 Mass. 334.

Cases in the series of American Negligence Reports.

Among the numerous cases (from 1897 to date), reported in the series of American Negligence Reports on the question of Liability of Municipal Corporations for Personal Injuries Sustained by Reason of Excavations and Openings in Streets and Sidewalks, are the following:

Lord *v.* City of Mobile (Ala.), 1 Am. Neg. Rep. 397, (hole in sidewalk); City of Chicago *v.* Seben (Ill.), 1 Am. Neg. Rep. 418, (sewer inlet); Tisdale *v.* Town of Bridgewater (Mass.), 1 Am. Neg. Rep. 81, (excavation in sidewalk); Baker *v.* City of Grand Rapids (Mich.), 1 Am. Neg. Rep. 90, (sewer excavation); Village of Culbertson *v.* Holliday (Neb.), 1 Am. Neg. Rep. 111, (building excavation on street); Scanlon *v.* City of Watertown (N. Y. App. Div.), 1 Am. Neg. Rep. 487, (sewer excavation); City of Topeka *v.* Bradshaw (Kan. App.), 2 Am. Neg. Rep. 535, (cellar in sidewalk); Caven *v.* City of Troy (N. Y. App. Div.), 2 Am. Neg. Rep. 221, (excavation in sidewalk); City of Pawtucket (R. I.), 2 Am. Neg. Rep. 81, (elevator opening); Baldwin *v.* City of Springfield (Mo.), 3 Am. Neg. Rep. 423 (unguarded opening in sidewalk); Schafer *v.* Mayor, etc. (N. Y. Appeals), 3 Am. Neg. Rep. 726, (manhole in street); Bruch *v.* City of Phila. (Pa.), 3 Am. Neg. Rep. 476 (hole in sidewalk); Garmany *v.* City of Gainesville (Tex. Civ. App.), 3 Am. Neg. Rep. 292, (culvert at street crossing); City of Hillsboro *v.* Jackson (Tex. Civ. App.), 3 Am. Neg. Rep. 738, (sewer excavation); Sproul *v.* City of Seattle (Wash.), 3 Am. Neg. Rep. 300, (building excavation); Cooper *v.* City of Milwaukee (Wis.), 3 Am. Neg. Reg. 304, (coal hole); City of Columbus *v.* Ogeltree (Ga.), 4 Am. Neg. Rep. 37, (hole in sidewalk); Village of Canandaigua *v.* Foster (N. Y. Appeals,) 4 Am. Neg. Rep. 441, (grating in sidewalk); Mahnken *v.* Freeholders (N. J.), 5 Am. Neg. Rep. 192, (hole in bridge); Kane *v.* City of Yonkers (N. Y. App. Div.), 6 Am. Neg. Rep. 648, (falling through bridge); Rushton *v.* City of Allegheny (Pa.), 6 Am. Neg. Rep. 690, (coal hole); O'Neil *v.* City of Cambridge (Mass.), 7 Am. Neg. Rep. 264, (trench); Buckley *v.* Kansas City (Mo.), 7 Am. Neg. Rep. 608, (glass covering over areaway); McKissick *v.* City of St. Louis (Mo.), 7 Am. Neg. Rep. 608, (ventilator cover on sidewalk); City of Lincoln *v.* Pirner (Neb.), 7 Am. Neg. Rep. 279, (coal hole); Whitty *v.* City of Oshkosh (Wis), 7 Am. Neg. Rep. 372, (open hatchway on sidewalk); City of Kansas City *v.* Orr (Kan.), 8 Am. Neg. Rep. 36 (hole in street car track); Cloney *v.* City of Kalamazoo (Mich.), 8 Am. Neg. Rep. 334, (excavation at street crossing); Taylor *v.* City of Mankato (Minn.), 8 Am. Neg. Rep. 649, (opening in street); Kaseman *v.* Borough of Sunbury (Pa.), 8 Am. Neg Rep. 337, (opening in railroad embankment); City of Rosedale *v.* Cosgrove (Kan. App.), 9 Am. Neg Rep. 264, (unguarded excavation).

SCHWARTZBAUM v. THIRD AVENUE RAILROAD COMPANY.

Supreme Court, New York, Appellate Division, First Department, April, 1901.

PERSON CROSSING TRACK STRUCK BY STREET CAR — LOOKING UP AND DOWN TRACK — VIEW OBSTRUCTED BY PASSING CAR — CONTRIBUTORY NEGLIGENCE — IMPORTANCE OF RULING. — In an action to recover damages for the wrongful killing of plaintiff's intestate, who was run over by defendant's street car while crossing the track, it appeared that plaintiff's intestate and herself attempted to cross the track immediately after a street car had passed; that they looked up and down "between the tracks," but saw no car approaching; that plaintiff's intestate (her husband) was ahead of her, and she was about to step on the track to follow him when a car came up unexpectedly, and she jumped back and heard her husband scream, and she went around the rear of the car and found her husband lying on the other side. It also appeared that they crossed just after the downtown car had passed, which hindered a full view of the uptown track; that it was a dark, windy and rainy night, and they were directly under the elevated railroad. *Held*, that it was not contributory negligence on the part of plaintiff's intestate to fail to look in the direction of the approaching car, the passage of the downtown car having necessarily obstructed the view of the uptown car which struck the deceased (1).

VAN BRUNT, P. J., *dissents.*

1. The above case is an interesting adjudication upon the right of recovery in a very numerous class of accidents occurring in cities under similar circumstances. It will be observed that the court directly passes upon the want of contributory negligence on the part of the deceased for having attempted to go across the track immediately after a surface car had passed him. The evidence shows that after the car had passed him, he looked in both directions and immediately proceeded to cross the track. This, as is well known, is a common practice. Having looked to his left and seeing nothing coming down the track, he then looked to the right, just as he was stepping or about to step upon the uptown track and after the car had passed him, and immediately stepped in front of the car moving northward, which caused his death. The court in the case cited holds that the passage of the car ahead of the deceased necessarily obstructed the view of the up-town car, and that it was not contributory negligence for him to fail to look in the direction of the coming car until he was on or about upon the track.

We respectfully direct attention to this case as of importance, since it illustrates a very considerable number of cases happening under similar circumstances in crowded cities, and as establishing a precedent which would seem to relieve parties injured under similar circumstances from the charge of contributory negligence.

MOTION for a new trial upon exceptions ordered to be heard in the first instance upon dismissal of the complaint in action brought by Jennie Schwartzbaum, as administratrix, etc., of Moritz Schwartzbaum, deceased, against the Third Avenue Railroad Company, for negligent killing of plaintiff's intestate, who was run over by one of defendant's cars while crossing track. *Motion for new trial granted.*

SAMUEL GREENBAUM, for plaintiff (appellant).

HERBERT LIMBURGER, for defendant (respondent).

O'BRIEN, J. — Upon a prior appeal (54 App. Div. 164) a judgment entered on the dismissal of the complaint was reversed and a new trial ordered and it was held that from the evidence it could not be said as matter of law that the intestate was guilty of contributory negligence. The only question therefore upon this appeal is whether upon the evidence presented at the new trial, the learned trial judge was right in his view that the intestate was, as matter of law, guilty of contributory negligence. We say that is the only question because we do not understand that either upon the former or this appeal, there was any serious contention but that the defendant's negligence was a question for the jury.

We do not find in this record upon the question of contributory negligence any additional evidence which would change the conclusion at which we arrived when the case was last before us. Our attention, however, is called by the defendant to the testimony of the plaintiff upon the new trial, that when between the tracks she and her husband "looked downtown to see if there came a car up, because we wanted to go across. We looked from downtown, downtown and uptown. We did not see a car coming from uptown down nor a car coming from downtown up." She further stated that her husband was ahead of her and she went to step on the track to follow him when the car came up in front of her face, "so quick and unexpected — so quick," and she jumped back and heard her husband scream; that just before he was struck by the car the flash of a headlight came before her; that she went around the rear of the car and found her husband lying on the other side.

It is not made clearly to appear just when plaintiff looked, for though she says "between the tracks," she says she looked uptown as well as downtown to see if a car was approaching, for which there would have been no need had she left the downtown track. At any rate it is perfectly apparent that she was keeping an outlook as best she could and that her huband was doing the same. As upon the former appeal it again appears that they crossed just after the downtown car had passed, which would have hindered a full view of the uptown track, and that it was a dark, windy, rainy night,

and they were directly under the elevated railroad. It is insisted that they were bound to see the headlight of the uptown car, but this would not apprise them of how far away it was. As no signal was given they were not presumed to know that the car was approaching and was within a dangerous distance. As said in Henavie *v.* N. Y. Cent. and Hudson River R. R. Co., by the Court of Appeals in an opinion not yet reported [see this case reported in 9 Am. Neg. Rep. 345], "whether the decedent was conclusively shown to have been guilty of contributory negligence depends upon what occurred in an instant of time. There was some evidence of care on the part of the deceased because he looked in both directions when he started to cross the avenue, as well as when he was half way to the nearest track. * * * They (the jury) could also have found that if he saw the approaching engine he thought it was standing still. * * * It is difficult to tell in the night-time, when the track is level and straight, whether the headlight on an engine is approaching." (1) The same is true of the headlight on a street car. Nothing previously had apprised the plaintiff's intestate of the approach of the car, even assuming that in the moment he looked, he had seen the darkness, the headlight. That the car came up suddenly is apparent from the testimony that it came "so quick," words equivalent to the words "like lightning," used by the same witness on the former trial. Had the plaintiff and her husband looked, therefore, after crossing the south-bound track, it does not necessarily follow that they must have known of danger nor that they had time to avoid the accident.

The distinction between this case and that of Biederman *v.* Dry Dock E. B. & B. R. R. Co., 54 App. Div. (N. Y.) 294, which is urged upon our attention, may be again pointed out by referring to the leading facts, namely, that in the Biederman Case there was nothing to obstruct the vision of the little girl from the time she left the sidewalk until she was injured. Nor was there evidence that she looked. It also appeared that her head was covered with and nearly enclosed in a shawl which to some extent must have interfered with, if it did not seriously impair her sense of hearing and sight and thus prevent her being aware of the approaching car from which she received her injuries. In the present case the plaintiff and her husband had their view obstructed until they were almost upon the uptown track because of the south-bound car which had just passed. Moreover, the night was dark and rainy and they were underneath the elevated structure and, though the plaintiff

1. See the Henavie case, reported in this volume, p. 345, *ante.*

says they proceeded carefully, looking up and down, the northbound car came upon them swiftly and without warning, killing the husband, who was a little ahead, and nearly striking the plaintiff.

For the reason that the law of the case is stated in the former opinion and that in our view no new evidence to change the result has been adduced on the new trial, we think that the exceptions should be sustained and the motion for a new trial granted with costs to plaintiff to abide event.

HATCH, J., concurs.

INGRAHAM, J. — I concur in result as this case is controlled by former decisions. RUMSEY, J., concurs.

VAN BRUNT, P. J., dissents.

FOGARTY v. BOGERT.

Supreme Court, New York, Appellate Division, Second Department, March, 1901.

LANDLORD AND TENANT — DANGEROUS PREMISES — INVITATION — DUTY OF OWNER — QUESTION FOR JURY. — In an action to recover damages for injuries sustained in falling down a cellarway in front of defendant's premises, it appeared that plaintiff, seeing a notice on an apartment house that there was a flat to let, went to the basement and rang a bell, to make inquiries as to the flat, and, in turning towards a window which had been opened by a person, stepped back in the dark and fell down the cellarway which was unguarded. The sign stated that applications as to the flat were to be made elsewhere, but plaintiff did not see the notice, simply the sign "Flat to Let." *Held*, that although the sign was not an invitation to apply on the premises, but was a direct admonition to apply elsewhere, it was error to dismiss the complaint on the ground that plaintiff went upon the premises uninvited, as the construction of a pathway to the basement gate with a bell pull to communicate with inmates of house is an implied invitation to use the same for lawful and proper purposes, and it was the duty of the owner to exercise such degree of care as to render the same reasonably safe for persons lawfully using same, it being for the jury to determine whether the owner had exercised such care (1).

1. See former decision in this case, reported in 6 Am. Neg. Rep. 650.

See also the following recent cases between Landlord and Tenant:

In PEERLESS MANUFACTURING CO. *v.* BAGLEY ET AL *(Michigan, April, 1901)*, 85 N. W. Rep. 568, judgment for plaintiff was affirmed, the undisputed facts being as follows: "Plaintiff was engaged in the manufacture of clothing, and was tenant of a building owned by defendants. Throughout the building had been placed a number of water pipes, constituting an automatic sprinkler system, intended for extinguishing fire. On an extremely hot

APPEAL from Trial Term, Kings County.

Action for injuries by Margaret Fogarty against Seba M. Bogert. From a judgment dismissing the complaint, plaintiff appeals. *Judgment reversed.*

Sunday — July 4, 1897 — in the afternoon, a sprinkler head in a pipe in this automatic sprinkler system opened, and the water flooded the building, damaging plaintiff's goods. The sprinkler head was beneath a skylight in the roof of the building. The skylight had glazed sloping sides and vertical ends standing above the roof. A vertical section of the skylight formed substantially an inverted V. Across the bottom, and about in the line of the roof, was a sash containing panes of glass. Beneath this glass curtains, which could be moved, ran on wires. Two or three panes of glass had been taken out of the bottom sash, through one of which the water pipe ran up. It then turned, and ran horizontally lengthwise of the skylight, somewhat below the point where the sloping sides of the skylight united. Upon the top of this pipe were set the sprinkler heads, from one of which the water was discharged. The skylight was nearly twenty feet long by about twelve inches wide, and it was four feet three inches vertically from the bottom sash to the top of the skylight. The head itself was so made that at about a given temperature an alloy in it would fuse, and release a cap, and thus afford release for the water in the pipe by gravity pressure from a tank on the roof. It was intended that the alloy in these heads in question should stand a temperature of about 155 degrees Fahrenheit before fusing, and they were stamped "155" to indicate that fact. On July 10, 1897, after this accident, the head, which up to that time remained intact, fused when the temperature in the skylight was 146 degrees. The heads used in the skylight were of the same kind as those used elsewhere throughout the building. Near the top of each end of the skylight was an opening leading to a short pipe which opened into the air. Beneath each opening was a swinging window for ventilation. These ventilating windows, in hot weather, were usually kept open. They were closed Saturday, July 3d, at 1 p. m., and remained closed till after the accident.

"The following facts are established by the testimony: 1. That the relation of landlord and tenant, and no other, existed between the parties. 2. That there was no written lease, whether or not there was an agreement for one. 3. That there was no covenant forming part of the oral agreement for leasing that the premises were free from defects and fit for use, or that the landlord would keep them in repair and fit for use; that that oral agreement was simply that the plaintiff should occupy the premises for a certain period at a certain rental. 4. That an agreement, which, if plaintiff's testimony is believed, was, in effect, a part of the agreement as to tenancy, was made by defendants at the instance and for the benefit, at least in large part, of plaintiff; that there should be installed upon the demised premises a sprinkler system like that about to be installed in Burnham, Stoepel & Co.'s premises, and that this agreement was, without damage to plaintiff, performed as early as the September following the May or June which was the date of plaintiff's entry upon the premises demised to it. 5. That from September, 1896, to July, 1897, the sprinkler head had been part of the demised premises, which were in the actual occupancy of the plaintiff. 6. That defendants had no notice of any defect in the sprinkler head up to

Argued before GOODRICH, P. J., and WOODWARD, HIRSCHBERG, JENKS, and SEWELL, JJ.

STEPHEN B. JACOBS (RICHARD A. RENDICH, on the brief), for appellant.

FRANK G. WILD, for respondent.

the time of the accident. 7. That the defendants did not plan, or by their servants install, the sprinkler system, but that they committed the whole work of installation, including planning, labor, and material, to the General Fire Extinguisher Company under a clear and distinct contract; that that company is an experienced, competent, and reputable concern in its line of business; that defendants did not interfere with, or exercise supervision over, the work of installing, but left the work wholly in the hands of the extinguisher company. 8. That the work was inspected by an experienced insurance inspector before reduced insurance rates on the building and stock were procured. 9. That it is proper practice to put sprinkler heads in skylights. 10. That the extraordinary heat of the sun on July 4, 1897, caused a head in the skylight to open, which, under ordinary circumstances, remained closed. 11. That if such opening is due to the fault of any one, it is to the fault of the General Fire Extinguisher Company. The declaration charges neglect against the defendants, plaintiff's landlord, in negligently constructing an automatic sprinkler system. The court instructed the jury that the fact that the defendants "had used all ordinary precaution in employing suitable people to put this system in, and letting the contract to a reputable concern to put it in, was of itself no defense against the action in this case." In other words, the defendants were held responsible for the negligence, if any, of the party who put in the sprinkler system. The jury found that the apparatus was negligently constructed, and rendered a verdict for the plaintiff." *Held*, that plaintiff could hold defendants liable for the damage, and that defendants' remedy was against the extinguisher company. Judgment affirmed. Opinion by GRANT, J.

In MCGUIRE *v.* BOARD *(New York Supreme Court, Appellate Division, First Department, March, 1901)*, 68 N. Y. Supp. 1026, judgment dismissing complaint was affirmed. It appeared that defendant was the owner of an apartment house in the city of New York, in which was located a dumb-waiter for the use of tenants in the building. Plaintiff was a retail dealer in ice, and about three weeks prior to the day of the accident he first went to defendant's building for the purpose of supplying one of his customers with ice. The dumb-waiter was then pointed out by the janitor of the building, and as soon as plaintiff saw it he noticed that the bottom of it was rotten, and that the wood was worn around the screws holding a portion of the bottom in place; to which fact he called the janitor's attention, at the same time informing him that it was dangerous to use it. Three weeks later, when the plaintiff arrived at the building, he found that the dumb-waiter was at or near the third floor. He stepped into the shaft beneath the dumb-waiter, took hold of the rope operating it, and commenced to pull it down, when a piece of the bottom "pulled out" (as he had three weeks before predicted that it would), fell, and struck him on the head, inflicting a serious injury. *Held*, that plaintiff was guilty of contributory negligence. Opinion by MCLAUGHLIN, J. O'BRIEN, J., dissented.

In COLLIER *v.* COLLINS *(New York Supreme Court, Appellate Division,*

HIRSCHBERG, J. — The first trial of this case resulted in a dismissal of the complaint, but the judgment entered thereon was reversed by this court. Fogarty *v.* Bogert, 43 App. Div. 430, 6 Am. Neg. Rep. 650, 60 N. Y. Supp. 81. It then appeared that the plaintiff, seeing a sign upon the house No. 28 First place, in the borough

Second Department, March, 1901), 69 N. Y. Supp. 94, judgment dismissing complaint was reversed. In stating the case, GOODRICH, P. J., said: "At the time of the accident hereinafter referred to, the plaintiff, with her husband, occupied the ground floor of a tenement house on President street, in the borough of Brooklyn. Two other families lived in the house. There was an entrance for all the tenants, to the rear yard, through the cellar and up into the yard, which could have been used by the plaintiff, inasmuch as it was used by the other tenants. At the rear of the plaintiff's flat was a window opening into the yard, the sill being about two feet above the surface of the yard. There was also at this window, and opening into the yard, an iron gate, which swung on hinges, and was fastened with an iron screw and bolt. Under the window, and two feet lower than the window sill, was an area opening into the cellar, and about five feet deep; its mouth being 32x22 inches in size, and covered with a wooden slat grating 32x24 inches in size. This cover rested on the sides and rear of the area, but had no support next the house. It had no cleats or other appliances to hold it in place, or to prevent its slipping off the edges and into the area. That such a construction was very dangerous to persons passing over it is apparent. The plaintiff in May, 1898, hired the flat from the janitor — the owner being a nonresident — and was accustomed to pay him the rent. She testified that at the time of the hiring she asked the janitor 'whether that gate was for persons to use when they hung out clothes. He said: "Yes;" every one had always used it since he had been there.' She also testified that he showed her out into the kitchen, and told her: 'This is the way to go out in the yard, to use it for your washing and having your children in. * * * This is the place to go out and hang your clothes up. This gate as well as your door. It is intended for the tenants who live on the first floor to go out in the yard.' This evidence was abundantly sufficient to show that the defendant, through the janitor, his agent for the hiring of the premises, authorized the plaintiff's use of the window as a means of access to the yard. In September the plaintiff asked the janitor to 'fix the grating, because I did not think it was secure to go through the window, and he said he would do so, and he fixed it; jumped on it; said it was all right — that there was no danger whatever. That was two months before the accident. After that we used it always' to go into the yard. About ten o'clock on the night of the accident in question, the plaintiff had gone through the window to hang out clothes in the yard. Upon her return, and while stepping upon the grating, it gave way, or tilted into the hole or area; and she was thrown through the window, breaking the glass and receiving injuries. At the close of the plaintiff's evidence the court dismissed the complaint, and this appeal results." *Held*, that the questions of contributory negligence of plaintiff and negligence of defendant were properly for the jury, and it was error to dismiss complaint, the evidence not showing that plaintiff was guilty of contributory negligence as matter of law. Judgment reversed. HIRSCHBERG AND JENKS, J. J., dissented.

of Brooklyn, "Flat to Let," and desiring to hire a flat, rang the basement bell of the premises for the purpose of making inquiries. The basement gate is under the stoop, and is reached by a flagged walk skirting a grass plot, and terminating with two steps (down) to a stone platform, forty and one-half inches square. Standing on this platform, and facing the basement gate and bell, the house is to the left, and immediately behind is a flight of stone steps leading to the cellar, and unguarded. There is a window, the greater portion of which is directly over these steps. When the plaintiff pulled the bell on the night in question this window was raised by a servant of one of the occupants of the building, and, turning to communicate with her, the plaintiff was at once pitched down the cellar steps, and injured.

The first nonsuit was reversed because the display of the notice mentioned "by a houseowner upon the premises, in the absence of any direction therein to apply elsewhere, constitutes an implied invitation to persons desiring such apartments to apply there for information concerning the rooms thus offered for rent," and therefore the plaintiff was to be "regarded as having properly gone, at the invitation of the defendant, to the basement gate of the defendant's apartment house." In this connection, Mr. Justice Bartlett said: "It may be that the case will present a different aspect when the defense is put in. For example, an invitation to come upon the premises could hardly be predicated of the display of a notice which directed persons desiring to hire flats to apply at some other address." On this trial it was proven that the notice contained the words, "Flat to Let. Apply to Bergen & Son, 314 Court street." These were in "large dark letters," excepting that the words "Apply to" were in letters only half the size of the others. The plaintiff testified that all she saw, however, was the words "Flat to Let," and, knowing that in that vicinity the janitors generally live in the basement, she applied there, rather than at the front door on the stoop. She says it was dark, but she found the bell pull by feeling. There was an electric light in the street in front of the adjoining premises, but the evidence is to the effect that the grass plot casts the cellar way in shadow, and that the stairs cannot be seen. The plaintiff testified that she did not see them, and did not know of their existence and she further testified that, while she was acquainted with the different ways the houses were built in that neighborhood, she had never seen the cellar way of a house constructed like this one.

The learned trial justice nonsuited this time because of the affirmative proof not only that the sign was no invitation to apply on the

premises, but was a direct admonition to apply elsewhere. To this extent he was clearly correct. But the conclusion does not follow that "the plaintiff went upon the premises uninvited." The construction by the owner of the premises of the flagged pathway from the sidewalk to the basement gate, with a bell pull for communication with the inmates, is an implied invitation to use the same for all lawful and proper purposes of communication, in the absence of any evidence tending to restrict the use to the occupants of the building. A person ringing the doorbell of a house, not wantonly or in mischief, but in good faith, for civil inquiries, is neither a trespasser nor a mere licensee, but is in the position of one rightfully there, on the implied assurance of ordinary safety which is furnished by the presence and the purpose of the bell. To such a person the owner owes the duty, at least, of exercising that degree of care which will render him reasonably safe, provided he exercise all reasonable care himself. The case is distinguishable from that of a technical trespasser, or one on the premises by license or mere sufferance, who enters at his own risk, using the premises as they are, and in favor of whom no duty or care or vigilance exists beyond abstention from affirmative negligence, and the avoidance of intrinsically dangerous springs, snares, etc. The plaintiff having seen on the sign, even as the result of her own indifference or inattention only, the fact that a flat in the house was to let, could still lawfully ring the doorbell to inquire about it, and, even had she noticed that applications were to be made elsewhere, she might nevertheless lawfully inquire of the janitor on the premises on which floor the flat was located, or any other pertinent matter, an answer to which might avoid all necessity of calling on the agents. Doorbells are occasionally rung for the mere purpose of inquiring the way or the residence of some one in the neighborhood, or in the business of vending wares. In all such cases the bell must be regarded, in the absence of limitation or warning, as at least an implied invitation. And if the place where the caller is impliedly invited to stand for the purpose of securing communication with the occupants of the house is dangerous, because of the absence of ordinary care, as, for instance, if the platform or stoop gave way because of long-existing neglect and decay, it cannot be said that the owner has not failed in the discharge of a lawful duty or obligation. The principle is equally applicable to the immediate propinquity of a dark cellar stairway, or may be so in the judgment of a jury..

The language of Mr. Justice Bartlett in this case on the former appeal is still pertinent: "The circumstances thus justifying the inference that there was an invitation to the plaintiff to enter for the

purpose of inquiry, the question is presented whether the proximity of the cellar steps to the basement gate did not render it negligent on the part of the defendant to ask strangers to come there without in some manner warning them of the liability to which they were exposed of breaking their necks by taking a single step backward from the gate. * * * Even in the dark, one would hardly expect that a single step back from the place where she stood before a basement gate would precipitate her down a flight of stone steps into a cellar." The authorities cited by the respondent are all distinguishable from this case. In Victory *v.* Baker, 67 N. Y. 366, the deceased was not in the factory on the invitation of the owner, either express or implied. Page 370: "He was not there upon the business of the defendants, but upon the business of his employer. He entered by a way not intended to be used as an entrance to the factory, and, although the workmen and occasionally other persons used it, it was in disregard of the manifest intention of the defendants, as indicated by the fences and other arrangements of the property. It is not necessary to say that the deceased was a trespasser, but, at most, he was there by the sufferance of the defendants, and he took the risks attendant upon his being in the factory in the actual condition in which it was. A man may make an excavation on his own land, and leave it unguarded, without incurring any liability to persons passing over the land, with his license or permission, who may be injured by falling into it. Hounsell *v.* Smyth, 7 C. B. (N. S.) 729 (1); Bolch *v.* Smith, 7 Hurl. & N. 736 (2).

1. In Hounsell *v.* Smyth (Smith), 7 C. B. N. S. 731, it appeared that the owners of some waste land, which was bounded by two highways, had opened in it a quarry which was worked by their licensees, and the plaintiff, not knowing of the quarry, passed over the waste in the dark to get from one road to the other, and fell into the quarry. *Held*, that no duty was cast upon the owners to fence, as the digging of the quarry did not amount to a public nuisance. An owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road, or way, as to constitute a public nuisance.

2. In Bolch *v.* Smith, 7 H. & N. 736, it appeared that the workmen in a government dockyard were permitted to use the waterclosets erected for their accommodation, and for that purpose to use certain paths across the dockyard. A government contractor was permitted to erect in the dockyard machinery for the purpose of his work. He erected across a path which led to one of the waterclosets a revolving shaft, partly covered with planks. A workman in the dockyard, having gone along this path to the water closet, on his return stumbled, and on putting out his hand to save himself, his arm was caught by the shaft and lacerated. There was another path along which he might have gone, but the one he used was the more convenient. *Held*, that the contractor was not liable for the injury, since he was under no obligation to fence the shaft, and the defect in the fencing was apparent.

If the owner places a spring gun on his premises, or does other like act imminently dangerous to human life, and designed to endanger it, he may be held responsible, even to a trespasser; but the facts in this case do not bring it within the principle upon which the liability in the case supposed rests. So, also, where one allows a dangerous place in the nature of a trap to exist on his premises, he will be responsible for an injury caused thereby to persons who, by his invitation, express or implied, go thereon. The case of a customer who goes to trade at a store, or of a guest at an inn, are examples where the relation between the parties imposes a duty to make his premises reasonably safe for those who by his invitation enter them. Chapman *v.* Rothwell, 1 El., Bl. & El. 168 (1); Indermaur *v.* Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311" (2).

In Beck *v.* Carter, 68 N. Y. 283, the same distinction was observed, and the rule is stated in the headnote that: "Where the owner of land, expressly or by implication, invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who at the time is exercising ordinary care, such owner is answerable for the consequences. If, however, he gives but a bare permission to cross the premises, the licensee takes the risk of accidents in using the premises in the condition in which they are." In

1. In Chapman *v.* Rothwell, 1 El., Bl. & El. 168, the facts were: A husband, as administrator to his wife, declared that the defendant was in occupation of a brewery and an office, and a passage leading thereto from the public street used by him for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street; yet he wrongfully and negligently permitted a trap-door in the floor of the passage to lie and remain open without being properly guarded and lighted; and the wife, who had been in the office as a customer, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being open, and not properly guarded and lighted, whereby she was killed. *Held*, that the duty of the defendant, and breach, sufficiently appeared.

2. In Indermaur *v.* Dames, 2 L. R., C. P. 311, affirming 1 L. R. C. P. 274, it was held that it is the duty of the occupier of a building, with reference to persons resorting thereto in the course of business upon his invitation, express or implied, to exercise reasonable care to prevent damage happening to them from unusual danger in the construction of the premises, of which he has or ought to have knowledge. Any duty on the part of the occupier of a building to provide for the safety of a master workman employed to do work is equally owing to the servant workman whom he may lawfully send in his place The facts in the case were: The defendant was the occupier of a sugar refinery, in which was a shaft necessary for his business, but open and unfenced. Certain gas-fittings were being put up which it was desired to test. The plaintiff was sent by his employer, the gas-fitter, to the refinery

McAlpin *v.* Powell, 70 N. Y. 126, a fire escape was used by the tenants as a balcony, and the landlord was held not liable for an accident resulting from its unsafe condition, because he gave neither license nor permission for such use, and there was no indication that it was designed to be so used.

In Larmore *v.* Iron Co., 101 N. Y. 391, 4 N. E. Rep. 752, the person injured was on the premises without invitation, and the case was distinguished in the headnote "from one where the person injured is an employee of the owner, or where the injury is caused by some dangerous thing placed by the owner upon the premises, without giving warning thereof, or where the owner, in the prosecution of his own purpose or business, invites another, either expressly or impliedly, to come upon his land, who is injured by unreasonable or concealed dangers, or where a licensee is injured by some affirmative negligence." The court said (page 395, 101 N. Y., and page 754, 4 N. E. Rep.): "So, also, where the owner of land, in the prosecution of his own purposes or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon his premises, he cannot, with impunity, expose him to unreasonable or concealed dangers, as, for example, from an open trap in a passageway. The duty in this case is founded upon the plainest principles of justice. Corby *v.* Hill, 4 C. B. (N. S.) 556 (1); Smith *v.* London & St. K. Docks Co., L. R. 3 C. P. 326 (2);

for that purpose; while so engaged, the plaintiff fell down the shaft. *Held*, that the defendant was liable for the injuries.

1. In Corby *v.* Hill, 4 C. B., N. S. 556, the facts were: An owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission by placing a quantity of slates there in such a manner that B. in using the road sustained damage. *Held*, that A. was liable. *Held*, also, that the declaration was not objectionable for not averring that the obstruction was placed on the road without permission, inasmuch as such an allegation, if traversed, would have presented an immaterial issue.

2. In Smith *v.* London & St. Katharine Docks Co., 3 L. R., C. P. 326, the facts were: A party, on the invitation of an officer of a vessel lying in the docks, went on board such vessel on business connected therewith, and on his return back he stepped on a gangway which formed the communication between the vessel and the shore when it tilted over and threw him into the water. The gangway was the means of access to the vessel, which the dock company had provided for that purpose; it was their property, and at the time of the accident was about to be rearranged by their servants to make it secure, it having been rendered unsafe by reason of their having just previously shifted the berth of a vessel on which it rested. The servants were aware of the gangway being dangerous, but the party was not. *Held*, that

Holmes *v.* North Eastern Railway Co., L. R. 6 Exch. 123."(1)

The distinction between a licensee and one on the premises by implied invitation is also recognized in Cusick *v.* Adams, 115 N. Y. 55, 21 N. E. Rep. 673, and Sterger *v.* Van Siclen, 132 N. Y. 499, 30 N. E. Rep. 987; while in Bond *v.* Smith, 113 N. Y. 378, 21 N. E. Rep. 128, the decision was based upon a failure to establish freedom from contributory negligence, and lack of proof that the area was a public nuisance, which the lower court had held it to be.

The case of Guichard *v.* New, 84 Hun, 54, 31 N. Y. Supp. 1080, is to some extent a direct authority in favor of the maintenance of this action. While the court in that case did not decide just what the injured boy's status was, the rule was laid down that the fact that a person who has sustained personal injuries while in a building belonging to another is technically a trespasser will not, as a matter of law, preclude a recovery of damages from the owner for the injuries he has sustained. In this case it is unnecessary to go so far. It is sufficient to hold that where the owner of property has constructed a doorway and bell, apparently for general use, he owes to those who may call for any legitimate purpose the duty of exercising some care, to the end that it may be reasonably safe for them to stand there and ring; and that it is for a jury to determine whether the presence of an unguarded stairway so near that an instinctive motion or turn towards one in the house, who responds to the ringing, will precipitate the caller down the stairs, is consistent with the exercise of such care.

The judgment and order should be reversed.

there was a duty on the part of the company to have made the gangway safe, or to have given him notice of the danger; and that, for the breach of such duty, he had a right of action against the company.

1. The facts in Holmes *v.* North Eastern Railway Co., L. R., 6 Exch. 123, affirming L. R., 4 Exch. 254, were: At a railway station it was the practice to unload coal wagons by shunting them, and tipping the coal into cells; it was also the practice for the consignees of the coal or their servants to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons. A consignee of the coal wagon could not unload it in the usual way on account of all the cells being occupied. With the permission of the station-master he went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon, and descended on to the flagged path. The flag he stepped on gave way, and he fell into one of the cells, and was injured. *Held*, that although not getting his coal in the usual mode, he was not a mere licensee, but was engaged, with the consent of the company, in a transaction of common interest to both parties, and was therefore entitled to require that the premises should be in a reasonably secure condition.

CASSIO v. BROOKLYN HEIGHTS RAILROAD COMPANY.

Supreme Court, New York, Appellate Division, Second Department, March, 1901.

BOARDING OPEN STREET CAR WHILE IN MOTION — RIDING ON FOOTBOARD — STRUCK BY ELEVATED RAILROAD PILLAR — CONTRIBUTORY NEGLIGENCE. — In an action to recover damages for injuries sustained by plaintiff who was struck by an elevated railroad pillar while he was on the running board of one of defendant's open street cars, plaintiff testified that he stood on the corner of a street waiting for a car; that he signaled the car to stop; that it stopped; that as soon as he got on the running board the car started right away; that he was carried about fifteen feet when he was struck by a pillar of the elevated railroad structure, and that he was facing in the direction in which the car was moving. Plaintiff's testimony was unsupported. Defendant's witnesses testified that the car was in motion when plaintiff boarded it, and instead of entering the car, started to swing himself along the running board, and while so doing came in contact with the pillar. There was also evidence that the conductor warned plaintiff as he jumped on the car "to look out for the elevated railroad pillar." *Held*, that plaintiff was guilty of contributory negligence, and judgment in his favor was reversed (1.)

APPEAL from Trial Term, Kings County.

Action by Antonio Cassio against the Brooklyn Heights Railroad Company. From a judgment in favor of plaintiff, and an order denying a motion for new trial, defendant appeals. *Judgment reversed.*

Argued before GOODRICH, P. J., and WOODWARD, HIRSCHBERG, JENKS, and SEWELL, JJ.

CHARLES A. COLLIN, for appellant.

WILLIAM O. MILES, for respondent.

JENKS, J. — The plaintiff gained a verdict for $200 damages for personal injuries, and this appeal is by the defendant from the judgment and order denying a new trial.

1. For actions arising out of Accidents similar to the case at bar, from the earliest period to 1897, see vols, 9 and 10 Am. Neg. Cas. Subsequent actions on the same topic appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

For actions relating to Persons Injured while Alighting from or Boarding Street Cars, Trains, etc., from the earliest period to 1897, see vols. 2–7 Am. Neg. Cas., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent actions to date appear in vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

See Notes of Recent Cases relating to Accidents while Alighting from or Boarding Street Cars, Trains, etc., at end of this case.

In Kaare *v.* Iron Co., 139 N. Y. 369, 377, 34 N. E. Rep. 901, 903, the court say: "But where there is a vast preponderance in the evidence in favor of the defendant, and the defense is supported by numerous witnesses apparently entitled to credit, either unsupported or slightly supported, the general term should exercise an independent judgment, and give the defendant appealing to it the full benefit which the law, by the right of appeal, intends he should have." See, too, Black *v.* Second Ave. R. R. Co., 44 App. Div. 333, 60 N. Y. Supp. 631; Harris *v.* Second Ave. R. R. Co., 48 App. Div. 118, 62 N. Y. Supp. 562, 7 Am. Neg. Rep. 368n; Colvin *v.* Railroad Co., 32 App. Div. 76, 52 N. Y. Supp. 698.

I am of opinion that this judgment must be reversed on the principle of these decisions, on the ground that the plaintiff failed to show his freedom from negligence contributing to the accident. The plaintiff's case rests upon his own testimony, unsupported. He testifies that he stood on the corner of a street; that before the car came to the corner he "did something to make it stop; that the car was stopped, and as soon as he 'got on the car' it started right away, and before he 'got on;'" that it was an open car, with a running board; that he did not enter the body of the car; that he had no time, because the car started all at once, and as soon as the car started he was struck by a pillar of the elevated railroad structure, and was injured. He further testifies that he was not thrown off the car until contact with the pillar; that he remained in the same attitude until such contact; that he was carried about fifteen feet before he was struck; and that he was facing in the direction in which the car was moving. The defendant called ten witnesses. Two were the conductor and the motorman, who were not then in the defendant's employ; one was an employee of the defendant, who was a passenger; and the others were passengers. All these witnesses testify directly that the car was in motion when the plaintiff boarded it, describing its speed from "ordinary" or "usual" to from three or four to six miles an hour. Several of these witnesses testify that the plaintiff came running after the car, jumped onto the side board, and, instead of entering the car, which was not crowded or full, started to swing himself along the side board to another and more distant seat, and while so doing he came in contact with the pillar. Bedell says there was a seat directly alongside of the plaintiff. Several witnesses testify that the conductor warned him as he jumped on the car to "look out for the elevated railroad post." Thus the evidence is clearly preponderant that the car was in motion at the time the plaintiff jumped on it; that plaintiff did not then enter the car, as he might have done, but

swung himself along the running board; that the conductor cried out to him, as soon as he boarded the car, to look out for the posts; and the plaintiff testifies himself that he was facing in the direction that the car was going. The motorman did not see the plaintiff, and received no signal to stop the car. The plaintiff ran at the car from the side, or after it, while it was in motion. There is no evidence from which a person of ordinary care or prudence would have been justified in the belief that the car, then in motion, would come to a standstill before reaching the pillar. In my opinion, the conduct of the plaintiff, under the facts established by the defendant, was negligent, and contributed to the collision that was the sole cause of his injury. Moylan *v.* Second Ave. R. R. Co., 128 N. Y. 584 (1); Murphy *v.* Railroad Co., 6 Misc. Rep. 298, 26 N. Y. Supp. 783, affirmed in 149 N. Y. 609, 44 N. E. Rep. 1126.

The judgment and order should be reversed, and a new trial ordered, with costs to abide the event. All concur, except SEWELL, J., taking no part.

NOTES OF RECENT CASES RELATING TO PERSONS INJURED WHILE ALIGHTING FROM OR BOARDING STREET CARS, TRAINS, ETC.

Passenger boarding open street car — Sudden start — Struck by pole.

In CITIZENS' STREET RY. CO. *v.* MERL (*Indiana Appeals, February, 1901*), 59 N. E. Rep. 491, the facts as stated in opinion by WILEY, J., are as follows: "Appellant [defendant below] owned and operated a system of street-railway lines in Indianapolis. One of the lines was on Washington street, and consisted of a double track thereon, and poles between the tracks, upon which the electric wires were attached. Appellant was repairing its tracks on East Washington street, and on account thereof a portion of the north track between Highland avenue and Cruse street was torn up, and the cars could not run thereon. It became necessary, on account of this condition of the north track, to switch the west-bound cars to the south track, and run them on the south track past that part of the north track that was being repaired. The cars, when thus running on the south track, had to be entered by persons desiring to be carried thereon from the north side; that being the side next to the poles between the tracks. Appellee desired to enter a west-bound car as a passenger. He presented himself at a place along the line where cars usually stopped to take

1. Moylan *v.* Second Ave. R. R. Co., 128 N. Y. 584, is reported in 5 Am. Neg. Cas. 351.

on and discharge passengers, and signaled the motorman of an approaching car, which was an open summer car, said car being equipped with a running board, or platform, running horizontally along the north side of the car, which was used by persons entering and alighting. After he had signaled the motorman that he desired to take passage, the motorman "slowed up" the car until it came nearly to a stop. He then stepped upon the running board near the front end of the car, and found the seats on the front end and middle of the car crowded with passengers, and he was compelled to go to the rear end of the car to obtain a seat or standing room. As soon as he stepped upon the running board, the car was started up rapidly and suddenly forward, and was soon under full headway. While he was attempting to go to the rear of the car to obtain a seat, and while walking on the running board, without any fault on his part, and without any warning from the servants in charge of the car, he was struck in the back and head by coming in contact with one of the poles above described, and was injured. These facts are all pleaded in the complaint. A demurrer to the complaint was overruled. The case was put at issue by an answer in denial. Trial by jury, resulting in a general verdict for appellee. The jury also made a special finding of facts by their answers to interrogatories. Appellant moved for a new trial, and for judgment on the answers to interrogatories, and these motions were overruled." In discussing the questions on appeal, the court said: "In instruction No. 7 the court told the jury that it was not necessarily negligent for a passenger to get upon a street car, even though he knew the track was being repaired, or that there were iron poles in close proximity to the track, on the side of the track on which he was about to enter; for if the car stopped or slackened its speed at his signal, and he was allowed to get on the running board, such acts on the part of the company were an invitation to the person to take passage; and that he had a right to presume that the company would use due care to avoid danger to passengers incident to the dangerous condition of the track and the close proximity of the poles thereto; that the passenger had a right to assume that the company's employees would warn him of any danger, and that they would exercise such care as a person of highest degree of skill and foresight, with knowledge of the existing circumstances, would use, in view of such dangers, to guard against accidents to passengers by reason thereof. This instruction is not subject to the objection urged against it. When a person desires to take passage on a street car, and signals such car, indicating his intention, if such person be at a point or place on the line where

such car is required to stop to receive passengers, if the car is stopped, or its speed slackened, the company thus extends an invitation to such person to become a passenger, and he has a right to enter. He becomes a passenger, under such circumstances, as soon as he steps upon the running board or steps of the car, and the company is bound to treat him as a passenger. This proposition presupposes the fact that the employees in charge of the car are aware of the facts stated. See Citizens' St. Ry. Co. *v.* Twiname, 111 Ind. 590, 9 Am. Neg. Cas. 290n; Conner *v.* Citizens' St. Ry. Co., 105 Ind. 62, 3 Am. Neg. Cas. 181; Barth *v.* Railway Co., 142 Mo. 535, 44 S. W. Rep. 778; Booth, St. Ry. Law, 328; Railroad Co. *v.* James, 69 Ill. App. 609; Railroad Co. *v.* Klein, 8 App. D. C. 75. A person about to take passage upon a street-railway car, he himself being without fault, has a right to rely upon an opportunity being given him to enter it in safety, or of being notified of any apparent danger foreseen by employees. Citizens' St. R. R. Co. *v.* Merl, 134 Ind. 609, 3 Am. Neg. Cas. 287, 33 N. E. Rep. 1014; Thomp. Carr. 233. See, also, Louis. N. A. & C. Ry. Co. *v.* Lucas, 119 Ind. 583, 3 Am. Neg. Cas. 240, 21 N. E. Rep. 968; Pennsylvania Co. *v.* Marion, 123 Ind. 415, 3 Am. Neg. Cas. 261, 23 N. E. Rep. 973. It is also well settled that carriers of passengers are required to give passengers ample or reasonable time to get on and off cars. Akersloot *v.* Second Ave. R. R. Co., 131 N. Y. 599, 5 Am. Neg. Cas. 359, 30 N. E. Rep. 195; Steeg *v.* Railway Co., 50 Minn. 149, 52 N. W. Rep. 393; West Chicago St. Ry. Co. *v.* Craig, 57 Ill. App. 441, 2 Am. Neg. Cas. 536; De Rozas *v.* Met. St. R. R. Co., 13 App. Div. (N. Y.) 296, 1 Am. Neg. Rep. 145, 43 N. Y. Supp. 27.

In instruction No. 10 the court told the jury that if they found that appellee signaled the car, and that its speed was slackened at or near a crossing where appellant was accustomed to receive passengers, and that it was apparently safe for him to board the car, it was not necessarily negligence, as a matter of law, for him to attempt to get on the car while it was in motion. It also told the jury that appellee had a right to rely upon the watchfulness and care which it was the duty of the conductor to bestow towards persons about to take passage, and that he was not bound to anticipate that the car would start rapidly, or that he might be thrown against the pole, etc. It is only to the latter part of this instruction that objection is made. In the case of Citizens' St. Ry Co. *v.* Twiname, *supra*, an instruction substantially like this one was approved. We have no doubt it correctly states the law. When a person enters a street car as a passenger, it is the duty of the conductor in charge of the car to see that he is in a place of safety before he gives the signal

to start. Akersloot *v.* Railroad Co., *supra.* See, also, Dochtermann *v.* Brooklyn Heights R. R. Co., 30 App. Div. (N. Y.) 624, 4 Am. Neg. Rep. 689, 52 N. Y. Supp. 1051; Steeg *v.* Railway Co., *supra.*" Judgment affirmed.

Falling from street car while alighting therefrom — Carrier not liable.

In GRETZNER *v.* NEW ORLEANS & CARROLLTON R. R. Co. (*Louisiana, November, 1900*) 29 S. Rep. 496, judgment for plaintiff for $4,000, who was injured while alighting from defendant's street car, was reversed, the syllabus by the court stating the case as follows:

"1. In this action, brought by plaintiff to recover damages for injuries received from a fall while disembarking, it appears that the car was brought to a stop, when plaintiff stepped to the rear platform, and from it sought to step down to the pavement by stepping with his two feet on the step, and then attempting to descend to the pavement with his right foot, while the left was still resting on the step. It was then he fell. He ascribes the cause of his fall to a shock or sudden and unexpected movement forward of the car. The preponderance of the evidence proves that the car did not move at all at the time. There is want of sufficient evidence to establish the truth of the averment of the complainant.

"2. The car and its appurtenances were in good order, and nothing shows that the employees by whom it was manned were unskillful or negligent.

"3. There was nothing extraordinary in the stop as made to discharge the plaintiff as a passenger, and no act was shown for which defendant can be held liable in damages."

A rehearing in the GRETZNER Case (*supra*) was denied March 8, 1901.

Passenger thrown from platform of street car — Riding on platform — Rules and regulations — Question for jury.

In SWEETLAND *v.* LYNN AND BOSTON R. R. Co. (*Massachusetts, February, 1901*) 59 N. E. Rep. 443, action for injuries sustained while riding on platform of street car, exceptions to judgment in favor of plaintiff were overruled. KNOWLTON, J., rendered the opinion as follows: "There was evidence of negligence on the part of the defendant's motorman in running the car. The car was about to pass over a frog at a curve where the defendant's rules required that cars should not be run faster than four miles an hour, and there was testimony that the car was suddenly started up just before it reached the frog, and was going at the rate of twelve or fifteen miles an hour when it struck the frog and threw

the plaintiff off. There was also evidence from which the jury might find that the plaintiff was in the exercise of due care, notwithstanding that he was riding on the front platform of the car, unless he was acting in violation of one of the defendant's rules in being there. Ordinarily it is a question of fact for a jury whether a passenger riding on the front platform of an electric car or a horse car is in the exercise of due care. Lapointe *v.* Middlesex R. R. Co., 144 Mass. 18–21, 9 Am. Neg. Cas. 447n, 10 N. E. Rep. 497; Cummings *v.* Railway Co., 166 Mass. 220, 44 N. E. Rep. 126; Wilde *v.* Lynn and Boston R. R. Co., 163 Mass. 533, 9 Am. Neg. Cas. 447n, 40 N. E. Rep. 851; Beal *v.* Lowell & D. St. Ry. Co., 157 Mass. 444, 9 Am. Neg. Cas. 447n, 32 N. E. Rep. 653. The remaining question in the case relates to the effect of a sign attached to the hood of the car before and at the time of the accident, which read as follows: 'Notice. All persons are forbidden to be on the front platform of this car, and this company will not be responsible for their safety. Per order of the directors.' This purports to be a prohibition of passengers from riding on the front platform, and not a notice stating the terms on which they may ride there. The judge rightly instructed the jury that such a rule would be reasonable (O'Neill *v.* Lynn and Boston R. R. Co., 155 Mass. 371, 9 Am. Neg. Cas. 446n, 29 N. E. Rep. 630), and that, if the plaintiff was intentionally violating the rule, he could not recover (Dodge *v.* Boston and Bangor S. S. Co., 148 Mass. 207, 3 Am. Neg. Cas. 843, 19 N. E. Rep. 373; Wills *v.* Lynn and Boston R. R. Co., 129 Mass. 351, 9 Am. Neg. Cas. 446n). But the jury were permitted to find that, notwithstanding the sign, the rule, if it ever was intended to be a rule, had been allowed by the defendant to become a dead letter, so that in effect the case was as if there never had been such a rule. We have no doubt that a railroad company, after making a rule in regard to the conduct of passengers, may waive and abandon it, and treat passengers as if it had never existed, and thus lead them to believe that the rule is no longer in force. If a railroad company does this, it cannot set up the rule to defeat the rightful claim of a passenger who has acted in the well-warranted belief that the rule is not in force. Chicago, Mil. & St. P. Ry. Co. *v.* Lowell, 151 U. S. 209, 7 Am. Neg. Cas. 373, 14 Sup. Ct. Rep. 281; Railway Co. *v.* Slattery, 3 App. Cas. 1155; Jones *v.* Railway Co., 43 Minn. 279, 45 N. W. Rep. 444; N. Y., L. E. & W. R. R. Co. *v.* Ball, 53 N. J. L. 286, 5 Am. Neg. Cas. 36n, 21 Atl. Rep. 1052. If such signs as this are placed over the front platform of cars, and if afterwards the persons in charge of the cars are accustomed to receive passengers upon the cars in such numbers as to crowd the front and rear platforms, as

well as the other parts of the cars, and the passengers are permitted to ride freely and without question upon the front platforms, paying for so riding the usual fare, the passengers may well believe, and the jury may well find, that the notice was not intended as a rule to be obeyed, and that the front platforms were intended by the company to be used by passengers. The officers of the company might be supposed to know the habitual methods of their servants in managing their cars. We are of opinion that the instructions were correct, and that the evidence well warranted the submission of the questions to the jury. Exceptions overruled."

Passenger alighting from street car struck by hose cart — Carrier not bound to warn passenger.

In ODDY *v.* WEST END STREET R'Y CO. (*Massachusetts, March, 1901*), 59 N. E. Rep. 1026, actions by Maria Oddy and William P. Oddy against the West End Street-Railway Company, for injuries sustained by the former as she was alighting from a street car, verdicts were entered for defendant, and the case reserved for consideration of the full court, on stipulation that, if the court adjudged plaintiffs entitled to go to the jury, judgments would be entered for them. The Supreme Court rendered judgment on the verdicts for defendant. BARKER, J., stated the case as follows: "These actions are on account of injuries received by a passenger as she was leaving a street car, by her coming into collision with a hose cart rapidly passing into the street. The car was upon one of two parallel sets of tracks, and its rear platform was furnished with gates, the one on the side next the other track being closed. The car stopped to receive and deliver passengers only at designated points. After it had passed the last stopping place before that at which the passenger intended to leave, the conductor opened the door from the rear platform, put his head into the car, and called out the name of the next stopping place. The passenger thereupon gave him a signal, which indicated that she wished to leave the car at the stopping place the name of which had just been called, and saw that the conductor appreciated her signal. Presently, the car slowed up and stopped. As it was slowing up, the plaintiff rose from her seat, and walked to the rear door, reaching the platform as the car came to a standstill, and then going down the steps, and placing herself in the street, either stepping into the wheel of a rapidly passing hose cart, as one eyewitness who was also a passenger upon the car testified, or being struck by the hose cart as she was leaving the car. The car had not in fact arrived at the stopping place the name of which had been called by the

conductor, nor was it in fact stopped in consequence of any order or signal given by the conductor, nor for the purpose of delivering or receiving passengers, but was stopped by the motorman because he saw approaching a fire engine and a hose cart, which were being run to a fire, and were coming towards the car at a high rate of speed, in the direction opposite to that in which the car was moving. This stoppage was in accordance with a reasonable practice, in order to avoid collisions between moving cars and fire apparatus driven at high rates of speed. In this instance the hose cart approached upon the same tracks on which the car was. When near the car, the cart turned to the left, and came very near the car. The fire engine passed first, upon the other side, but with a very short interval of time. When the car began to slow up, the conductor, being on the rear platform, ascertained that the fire apparatus was approaching. He looked over the closed gate, and saw the engine pass, and he continued to look in the same direction to ascertain when the hose cart should have passed. He did not see the passenger as she came from the car to the platform, nor until his attention was called to the other side by the passing of the hose cart, when he saw her on the ground. The passenger did not know that there was an alarm of fire, or that fire apparatus was approaching, and the jury might infer that, when she rose as the car was slowing up, she supposed that it was preparing to stop at the stopping place the name of which had been called out. She testified that she heard the sound of a gong as she was getting up and walking towards the platform, but that she thought it was a car coming in the opposite direction, and that she had never before been on a car when it stopped to let fire apparatus go by. The time was eight o'clock on the evening of January 7, 1897. The passenger was fifty-two years of age, and there is no contention that she was not in full possession of her mental and bodily powers." The court, after reviewing the evidence, said: "We are of opinion that it would not be competent to find the defendant guilty of negligence upon the evidence. It was right for the motorman to stop the car where he did upon the approach of the fire apparatus. It is not customary or necessary to notify passengers of the cause of a stoppage occasioned by an obstruction in the street. The conductor, while bound to give the passenger an opportunity to leave at the stopping place which she had indicated to him as the point where she wished her journey to end, was not obliged to inform her that that place had not been reached, unless he knew that she was attempting to leave under a misapprehension, and it was his duty to attend to the very things to which he was attending, namely, to ascertain when the obstruction

to the progress of the car should cease by the passing of the approaching fire apparatus. Street-car companies, carrying passengers in ordinary public streets or highways, are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with, or of being run over by, other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger, and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning." Judgments for the defendants on the verdicts.

Boarding street car — Personal injuries — Evidence — Permanent injuries — Erroneous instructions.

In MAIMONE *v.* DRY DOCK, EAST BROADWAY AND BATTERY R. R. CO. (*New York, Supreme Court, Appellate Division, First Department, March, 1901*), 68 N. Y. Supp. 1074, judgment for plaintiff, in action for injuries sustained while boarding street car, was reversed on erroneous admission of evidence as to personal injuries and submission of issue of permanent injury. MCLAUGHLIN, J., in the course of his opininion, said: "The complaint alleged, in substance, that the plaintiff attempted to enter one of the defendant's cars, and while he was in the act of doing so the car was, without warning to him, suddenly started, and he was thrown to the street and 'severely bruised and injured in the left leg and left arm, and also suffered injury to his spine, and was also injured internally, by reason whereof he was rendered incapable of following any occupation, and still is incapable of attending to any business.' The answer was substantially a general denial of the material allegations of the complaint. Upon the trial the evidence introduced was sufficient to justify the jury in finding that the defendant negligently started its car while the plaintiff was in the act of getting into it, and the amount of damages awarded cannot be said to be excessive. It is, however, claimed that errors were committed, both in the admission of evidence and in the instructions given to the jury by the learned trial justice, which necessitate a reversal of the judgment." After reviewing the evidence as to personal injuries, especially as to that of a physician who testified for plaintiff that the injury might have been a constitutional ailment or might have been caused through some force exerted on the spine, the court said: "At the close of plaintiff's case the defendant moved to strike out this testimony upon the ground that it did not show with any reasonable certainty that the condition of the plaintiff at the time of the trial was caused by or resulted from the injuries referred to in the complaint. The motion was denied, and the defendant excepted. No evidence whatever

was given to the effect that the plaintiff's injuries were permanent, or that after the trial they would cause him pain, or diminish in any degree his earning capacity. The learned trial justice, in submitting the case to the jury, charged that they might award the plaintiff damages for the pain and suffering he had endured, and also 'for such further pain and suffering as you are prepared to say, from the evidence, he will be called upon to endure in the future, within reasonable probability, because of such injuries. It is also claimed that the plaintiff has been permanently injured, and, if you find this to be a fact, you may award reasonable compensation to him for the extent of any permanent injuries, such as you may find it to be.' To this portion of the charge the defendant excepted.

"We are of the opinion that both exceptions were well taken. First, as to the testimony of the doctor as to what might have caused the injury: It was, the way in which it was left, too speculative to afford any basis for an award by the jury. His testimony, in effect, was that the plaintiff's condition might be the result of a constitutional ailment, or it might be the result of some injury which he had received. If it were the result of a constitutional ailment, the defendant could not be held liable for that, and unless the plaintiff produced evidence from which the jury might find that such injuries were not the result of a constitutional ailment, but resulted from injuries caused by the negligent act of the defendant, then no recovery could be had, because the rule is well settled that where injuries have been sustained by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail, if the evidence does not show that the injury was produced by the former, and not by the latter, cause. * * * We are also of the opinion that the exception to that portion of the charge above quoted was well taken. There is not a particle of evidence in the record before us showing or tending to show that the plaintiff's injuries are permanent, or that he will suffer pain or inconvenience from them in any respect. The plaintiff called no expert upon the subject, and there was no objective injury, from the bare exhibition of which the inference of lasting, or, indeed, of any, suffering could be drawn. The jury, therefore, were left to speculate upon that subject. Webb *v.* Railway Co., 44 App. Div. 413, 60 N. Y. Supp. 1087. And this conclusion is not in hostility to Ayres *v.* Del., Lack. & W. R. R. Co., 158 N. Y. 254, 5 Am. Neg. Rep. 683, 53 N. E. Rep. 22. There the court was requested to charge that there was no ground upon which the jury could find any future damages in reference to an injury to the knee. At the time of the trial, which was three years after the

accident, the plaintiff could not walk without limping. This the jury saw. It also appeared that the plaintiff could not use that leg as well as the other, — that she could not swing it as far back as the other without causing more or less pain; and the court simply held that, the evidence being left in this condition, the defendant was not entitled to have the question of future damages entirely withdrawn from the jury. But in the case at bar, as already indicated, there was no evidence, either by a competent expert or by any one else, that the injuries were permanent, or that the plaintiff would suffer pain or be incapacitated by them to any extent subsequent to the trial. It follows, therefore, for the errors thus committed, that the judgment and order must be reversed, and a new trial ordered, with costs to the appellant to abide the event."

Alighting from street car — Deafness — Incompetent evidence — Motion to strike out appeal.

In HAMEL *v.* BROOKLYN HEIGHTS R. R. Co. (*New York, Supreme Court, Appellate Division, Second Department, March, 1901*) 69 N. Y. Supp. 166, action for damages for injuries sustained while alighting from street car, judgment for plaintiff for $3,000 was affirmed. On the trial evidence of plaintiff's deafness was introduced, but no evidence that such deafness was caused by the accident. While this evidence was objected to, no motion was made by defendant to strike it out. On this point, JENKS, J., in his opinion, said: "The learned counsel for the appellant [defendant] argues that it cannot be said that the jury did not consider this alleged impairment of hearing as an element of damage, and yet it was not properly proven, in that it was shown only that this impairment supervened after the accident, without proof of causal relation. There is much force in his contention. Saumby *v* City of Rochester, 145 N. Y. 81, 39 N. E. Rep. 715; Shear. & R. Neg. 742. But the difficulty is that he cannot raise the question. The fault with this evidence is that it is unconnected with any testimony showing or tending to show that the impaired hearing resulted from the injuries suffered by the plaintiff. The plaintiff has pleaded the specific injury. It was competent to show the present physical condition of the plaintiff with reference to her powers of hearing, and the testimony of the lay witness as to what she had personally observed was competent. Adams *v.* People, 63 N. Y. 621; King *v.* Railroad Co., 75 Hun, 17, 26 N. Y. Supp. 973, affirmed in 148 N. Y. 739, 42 N. E. Rep. 724. If this evidence had been connected with testimony of witnesses competent to speak upon the point that impaired hearing could have resulted from the accident, then a fair question would have been

presented for the jury, — whether there was such injury, and whether it was the direct result of the accident. The testimony now criticised was material then as partial proof, and has no place in the case only because the other part of the proof was never supplied. When the plaintiff failed to supply such proof, the remedy of the defendant was a motion to strike out the objectionable testimony. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. Rep. 729, is directly in point. It was held in that case: 'When evidence tending to prove a material fact in issue is received under objection, and which requires proof of other facts to make it complete, which have not been supplied, its presence in the record is no ground for reversal, in the absence of a motion subsequently to strike it out.' " * * * Other points in the case related to evidence as to alleged attempts to get one of defendant's witnesses to testify falsely, and instructions as to preponderance of evidence.

Alighting from train — Contributory negligence — Pleading — Instruction.

In KENNEDY *v.* SOUTHERN R'Y CO. (*South Carolina, March, 1901.*) 38 S. E. Rep. 169, judgment for plaintiff, in action to recover damages for injuries sustained while alighting from train, caused by alleged failure to provide a safe alighting place, was reversed, it being error to charge that under a general denial and in the absence of any plea of contributory negligence, the jury could not consider whether plaintiff's negligence was the sole cause of the injury of which he complained. It was also error to refuse to charge, where there was a general denial, that plaintiff could not recover if he failed to exercise ordinary care to avoid being injured, as such failure could be shown under a general denial.

Alighting from train — Opinion evidence.

In EASLER ET AL. *v.* SOUTHERN R'Y CO. (*South Carolina, February, 1901*) 37 S. E. Rep. 938, action for injuries sustained while alighting from train, judgment for plaintiffs for $1,500 was reversed, it being held error to refuse to allow a witness to express his opinion as to whether there was a sufficient time, or not, for passengers to leave the train, the witness having previously given the facts upon which such opinion would be based. (See subsequent decision, on the question of personal examination, reported in this vol., 605, *post.*)

Alighting from train — Sudden backing of train — Wanton negligence — Exemplary damages — Instructions.

In APPLEBY ET AL. *v.* SOUTH CAROLINA AND GEORGIA R. R. CO. (*South Carolina, March, 1901*) 38 S. E. Rep. 237, judgment for

plaintiffs, in action for injuries sustained while preparing to alight from train, was affirmed. On the trial the jury rendered a verdict for plaintiffs for $10 000, but, on motion for new trial, the circuit judge required plaintiff to remit all except the sum of $7,500, which plaintiffs did. Defendants appealed and excepted to instructions on exemplary damages. On appeal, the court (per POPE, J.) reviewed the case at length, and in the opinion said: "In the consideration of a judge's charge, under exceptions thereto, it is always well to keep in mind the facts which had been in testimony, for it is always to be expected that a judge will charge the law applicable to certain facts; otherwise, he is dealing in abstract law. While a judge is, by our constitution, denied the privilege of giving a statement of the evidence, still he is not denied the privilege of having the facts of a particular cause in his mind. Let us briefly state what the facts were as testified to by plaintiff's witnesses. On the 24th December, 1898, at about 5:30 o'clock in the afternoon, the plaintiff, Mrs. Mary K. Appleby, under the care of her husband, Mr. Peter R. Appleby, after having purchased and paid for a first-class ticket on the defendant's train from Charleston, S. C., to Reevesville, S. C., both stations on the line of defendant's railroad, entered the first-class car attached to the train of said defendant, which was to leave the city of Charleston on its way to the city of Columbia, S C., on that day; and, after being seated, Mr. Appleby notified his wife that he would go out to see the conductor of that train, so as to request him to look after his said wife, and assist her to leave the said train when it reached Reevesville. He did see the conductor, who assured him that he would assist his wife to leave the train at Reevesville. This assurance of the conductor was conveyed to Mrs. Appleby by her husband. It was quite dark when the defendant's said train reached Reevesville. The station was announced by the railroad officials when Reevesville was reached, and Mrs. Appleby heard the announcement, and saw other passengers leaving the car at that station. She said she asked a gentleman who was leaving the train in company with his wife to assist her with her satchel and bundle, but he turned to her, showing that his arms were already full of bundles, and then he told her that he would send the conductor back to help her. Before the conductor or any other official reached her, the train was put in motion. Some gentleman said that there was a lady on the train who wished to get off at that station. Thereupon the moving train was stopped, and one of the railroad officials approached Mrs. Appleby, asking if she wished to leave the coach at that station. Upon her assurance that she did so wish, the said official took up her bag, and asked her to

go forward; he following immediately after her. When Mrs. Appleby was near the car door, which was ajar, she was thrown with great violence against the door, by the sudden, unannounced movement of the train with great violence, and thereby her finger was crushed and internal injuries inflicted upon her. So great was her pain thus suddenly inflicted that the trainman accompanying her with her baggage begged her to take a seat, and he went out, and the conductor and ticket-office keeper came, and, with one on each side of her, carried her out of the train, and the ticket agent accompanied her to the house of the family she came to visit. She suffered so much that her friends insisted that she should return to Charleston for medical aid, and this she did. Her family physician came to her, and described her internal injuries as serious. The said physician had been attending her off and on ever since her return to the city of Charleston. His bill for his services at one time amounted to $25, which was paid to him, and other bills have been made and paid. Besides, she is rendered unable to attend to the ordinary duties as mistress of her husband's home. Now, these facts were in the mind of the circuit judge when he made his charge. His charge was as follows, in part: 'Now, when a passenger buys a ticket, and enters a passenger train of the railroad company or common carrier, the duties are reciprocal; each has a duty to perform. The railroad company undertakes to carry him safely to his place of destination, and to land him, and, landing him, the law imposes upon it the duty of stopping at a sufficiently suitable place and for a sufficient length of time to enable him to alight in safety. Now, the duty upon the part of the passenger is that in alighting, and in traveling upon the coach of the defendant, the railroad company, he shall use all ordinary care to avoid accidents or injuries to himself. Those are the two duties. The railroad company undertakes to carry and land him in safety, — that is its contract, — and to use the highest degree of care in so doing. The passenger agrees to use ordinary care in protecting himself from injuries and accidents while either going to the place or alighting from the train. Now, the charge is here, as you observe, that the railroad company stopped at the place, and when the passenger undertook to alight it is contended that they backed the car, and the engineer backed the car with such violence and force as to cause injury to the plaintiff. That is denied by the railroad company. Now, if you should find that the railroad company was negligent in the manner in which it undertook to alight this passenger, or in the manner in which it stopped to enable the passenger to alight, then I charge you that the railroad company would be liable to compensate the

passenger in whatever damages she sustained. But if, on the contrary, you find that she, in alighting, did not use ordinary care to prevent accident or an injury to herself, then, though the railroad company should have been negligent, she could not recover in this accident, because, as I have already undertaken to explain to you, each owes a duty to the other; in other words, a passenger has no right to get up on top of a train to perform athletic feats, but he must observe ordinary care, prudence, and caution in protecting himself from injury or from harm. Now, I have been requested by the plaintiff's counsel to charge you certain propositions of law, which I will proceed to do: "The jury is instructed that the complaint herein alleges facts appropriate to two causes of action; one for actual damages, and the other for vindictive, punitive, or exemplary damages." That is true. That is the allegation of the complaint. Second. "The jury is instructed that it is the duty of the railroad company to provide reasonable means of protection so as to insure the safety of the passengers while boarding and alighting from its cars, and that a wanton or reckless disregard of such duty would render a railroad liable in exemplary damage to a person so injured." That I charge you to be the law. Third. "The jury is instructed that it is the duty of a railroad company to stop its cars at the destination of passengers along its line of road, and to allow such passengers a reasonable time at the station in which to leave its cars." That I charge you as I have already undertaken to explain to you to be the law. Fourth. "The jury is instructed that punitive or vindictive damages may be awarded by way of punishment where the legal rights of one person have been invaded through the wanton, wilful, or reckless disregard of such rights by some other person or corporation, and injuries resulting therefrom." This I charge you to be the law. Fifth. "The jury is instructed, if a passenger on board a railroad train is in the act of leaving its cars at a place of destination, and the railroad, through its servants and agents in charge thereof, without warning to such passenger, recklessly and carelessly causes the engine attached to said car to be thrown against the same suddenly, whereby a passenger is injured in person by being thrown against the cars, then the jury would be justified in law in awarding vindictive or punitive damages for personal injuries so received." That I charge you. I desire to explain to you further what exemplary or punitive damages are. It is different from actual damages. Actual damages is where you compensate a person for the damage he has actually received; but if you find the injuries have been the result of wanton and reckless disregard of the rights of the passenger, then, under the circumstances, you can

award what is known as "vindictive damages," — as smart money, or punishment to the company. But that is never allowed except you come to the conclusion that the injury was wantonly inflicted; not through carelessness or negligence, but through wantonness, wilfulness, and vindictiveness. For instance, if this electric railroad here, the motorman of a car saw the street crowded with individuals or persons, and he got on a head of speed, and made no effort whatever to avoid running over persons on the street, but, with utter disregard to their rights as pedestrians, he would injure any one under those circumstances, that would be a case of exemplary or punitive or vindictive damages wantonly or wilfully done. But, where the accident or injury is the result of negligence simply, a jury would not be warranted in awarding vindictive damages under those circumstances. For instance, if you should conclude a conductor had some grudge against a passenger, or that an engineer had some grudge against him, and when he went to alight from the train he would intentionally or wantonly or wilfully thrust his engine ahead or back, so as to injure him, if injured under such circumstances, then, in addition to actual damages he received, you could award vindictive or smart-money damages, as smart money, as punishment to the railroad company for inflicting such damages. That is what is meant by vindictive or smart-money damages.'" * * * It was held that from the facts the jury were justified in awarding actual and exemplary damages, and exceptions to the judge's charge were overruled.

Alighting from train — Sudden start — Authority of conductor.

In TEXAS AND PACIFIC R'Y CO. *v.* ELLIOTT (*Texas Civil Appeals, April, 1901*) 61 S. W. Rep. 726, passenger injured while alighting from train, judgment for plaintiff was affirmed, KEY, J., stating the case as follows: "This is a personal injury suit against the railway company, and from a verdict and judgment for $1,000 in favor of the plaintiff the defendant has appealed. The evidence justifying, in support of the verdict we find that the defendant was guilty of negligence in the manner charged in the plaintiff's petition. The plaintiff was not guilty of contributory negligence, and by reason of the defendant's negligence he sustained personal injuries as charged, for which $1,000, the amount awarded him by the verdict, is not unreasonable compensation. The plaintiff's testimony shows that he in good faith boarded a regular passenger train on appellant's road at Jefferson; that he paid to the conductor the fare demanded by the latter from Jefferson to Sulphur Station, a regular station upon appellant's road, but at which the train in question was not in

the habit of stopping, and the rules of the railway company forbade its stopping at that station. However, these rules were unknown to the plaintiff, and the conductor agreed to stop the train at or near that station for the plaintiff and two other passengers similarly situated to get off. According to the testimony submitted by the plaintiff, when the train reached a bridge near Sulphur Station, it slowed up to a speed of about four miles an hour. The plaintiff and the other two passengers referred to went out on the rear platform, followed by the conductor. The other two passengers alighted with safety from one side of the platform. The plaintiff was upon the other side, standing upon the lower step; and, according to his testimony, the conductor told him repeatedly to get off. At first he declined to do so, because there were some scantlings piled on the ground, but he finally attempted to get off, and about the time he did so the train gave a sudden jerk and threw him to the ground, by which fall he sustained the injuries complained of. The burden of appellant's contention is that, under the circumstances stated, the conductor had no authority to make a contract for the train to stop at Sulphur Station, or where it did, and the trial court erred in holding that he had such authority. We have no doubt whatever of the correctness of the ruling referred to. We find no merit in the appeal, and affirm the judgment. Hull *v.* Railway Co., 66 Tex. 619, 2 S. W. Rep. 831; Railway Co. *v.* Anderson, 82 Tex 520, 17 S. W. Rep. 1039; Railroad Co. *v.* Frazer (Kan. Sup.) 40 Pac. Rep. 924; Randolph *v.* Railway Co., 18 Mo. App. 609. Judgment affirmed."

Alighting from train — Safe place to alight — Absence of box or stool on platform — Carrier not liable.

In TEXAS MIDLAND R. R. Co. *v.* FREY (*Texas Civil Appeals, February, 1901*) 61 S. W. Rep. 442, action for injuries sustained while alighting from defendant's train, judgment for plaintiff for $2,000 was reversed. FLY, J., rendered the following opinion: "This is a suit to recover damages arising from personal injuries alleged to have been inflicted upon the wife of appellee through the negligence of appellant. Upon the verdict of a jury, judgment was rendered in favor of appellee for $2,000. It was alleged in the petition that Sarah Frey, the wife of appellee, got on a passenger train, belonging to appellant, at Terrell, Tex., to go to Ennis, Tex.; that when the train reached Ennis no platform had been provided upon which Mrs. Frey could alight, and she was compelled to alight upon the ground; that there was no box or stool to aid her in reaching the ground, and, although she exercised proper care in alighting, she

was severely and permanently injured. These were the only grounds of negligence alleged. The uncontroverted evidence established that there was a gravel and cement platform for the accommodation of passengers at Ennis, built on a level with the tracks, and that the platform was not more than eighteen inches from the lower step of the passenger coach. A man was employed at the depot to assist passengers on and off all trains, and he was assisted by the conductor. Mrs. Frey, the only witness who swore to the circumstances connected with her injury, testified as follows: '* * * I arrived at Ennis about noontime. It was raining and thundering and lightning when I reached Ennis. It was an awful pour, — lots of rain. Began raining in Terrell before I bought my ticket. When train reached Ennis I got off. A man assisted me to get off the car. He was the conductor, and was standing near the steps. I did not see any one else. He assisted me by taking hold of my left hand. I stepped from the car to the ground. It was an awfully long step to me. I did not notice the long distance from the step to the ground before I made the step. It was raining, and the conductor took hold of my left arm and assisted me off the train steps. I stepped right onto the ground, and did not see any box or stool there to step on. I then went into the depot.' It is evident from all the circumstances that what Mrs. Frey called the 'ground' was the gravel and cement platform. No effort was made to show that the step was more than eighteen inches from the 'ground' or platform where Mrs. Frey alighted, but all the evidence of negligence introduced by appellee is quoted above.

"It was the duty of the railway company to provide and maintain a safe way of reaching and departing from its cars at passenger stations, and it has been held in this State that such appliances must be 'the safest that had been known and tested.' Mo. Pac. Ry. Co. *v.* Wortham, 73 Tex. 25, 6 Am. Neg. Cas. 576, 10 S. W. Rep. 741. If there was any testimony in this case that tended to establish a failure upon the part of appellant to furnish such appliances, and Mrs. Frey was damaged thereby, the jury was justified in the verdict upon which the judgment was based. Under the facts in this case, there could have been but one possible ground upon which the jury could have based the verdict, and that was the failure to have a box or stool upon which Mrs. Frey could step in getting off the cars. That there was a platform was uncontroverted, and there was no attempt to prove that it was defective, or that it was not at the usual and ordinary distance from the steps of the cars. A man employed to assist passengers on and off the cars, and he or the conductor, or both, assisted Mrs. Frey, in a careful

manner, to alight from the cars. There is not one single fact that tends to establish negligence upon the part of the railway company, unless it should be presumed from the fact that Mrs. Frey was injured in stepping off the car. Can negligence be thus presumed from the mere happening of the event, none of the attending circumstances tending to establish negligence? We think not. San Ant. & A. P. Ry. Co. *v.* Robinson, 73 Tex. 277, 10 Am. Neg. Cas. 205, 11 S. W. Rep. 327; Broadway *v.* Gas Co. (Tex. Civ. App.) 60 S. W. Rep. 270. There is no testimony that would show that it was safer to step on a box or stool without assistance than to alight on a solid platform with assistance; and neither can it be said, in the absence of proof, that it is negligent to have the platform eighteen inches from the lowest step of the car. In the case of Mo. Pac. Ry. Co. *v.* Wortham, above cited, a box had been provided, upon which passengers could alight, and it turned, throwing a lady to the ground and injuring her. The platform was shown to have been defective, and the box too narrow for the purposes for which it was used. It was said by the court: 'It may be conceded that, if appellants had a proper platform at the station upon which the passengers could have alighted, their duty as to this matter would have been discharged, and that they were not called upon to render personal assistance.' In this case not only does the testimony fail to show an improper platform, but it tends to show a proper one, and, in addition, that proper personal assistance was given to persons alighting from the cars. Lafflin *v.* Buffalo & S. W. R. R. Co., 106 N. Y. 136, 5 Am. Neg. Cas. 268, 12 N. E. Rep. 599; Kelly *v.* Manhattan Ry. Co., 112 N. Y. 443, 9 Am. Neg. Cas. 598, 20 N. E. Rep. 383. Because there is no evidence to sustain the verdict, the judgment is reversed and the cause remanded."

Carrying past destination — Alighting at dangerous place.

In HENRY *v.* GRANT STREET ELECTRIC R'Y CO. (*Washington, March, 1901*), 64 Pac. Rep. 137, where plaintiff was put off at a dangerous place and injured on track, judgment for plaintiff for $4,000 was affirmed. The facts as stated by DUNBAR, J., were as follows: "On the night of the accident in question, respondent (plaintiff), Henry, became a passenger on one of the appellant's cars at the corner of Yesler and South Second streets in the city of Seattle, to be carried to the power house at the intersection of Charles street and Grant street. The respondent notified the conductor of the car that he desired to be put off at the power house; the proper landing being on Charles street, where the respondent was accustomed to be put off for the purpose of repairing to the power house.

As the car was nearing Charles street, the conductor called out 'Charles street!' and the respondent notified him that he wished to get off. The conductor then went out on the rear platform, and gave the bell for the motorman to stop the car. The car, however, did not stop on Charles street, where there is a plank roadway thirty-five or forty feet wide, guarded by railings on all sides, but, according to the testimony of the respondent, went about fifty feet beyond, where there is no protection for passengers alighting, where the track passes over a trestle some twelve or thirteen feet above the tide flats. The conductor had been informed that the respondent desired to go to the power house, and when the car stopped, and the respondent got off, the conductor, pointing east, remarked 'Right across,' or 'Right across there,' and the respondent, believing that the car was at the usual place of stopping, stepped from the car, striking his foot on the bull rail or scantling some twenty-two or twenty-three inches, according to the testimony, from the step of the car, and was precipitated to the ground through an unprotected space between the track and the wagon road, a distance of some twelve or thirteen feet, sustaining the injuries complained of." It was held that plaintiff was not guilty of contributory negligence; and that defendant was negligent in discharging plaintiff at a dangerous place; the court not finding any cases "that hold that the plaintiff, under such circumstances as are portrayed by the testimony in this case, was guilty of contributory negligence. We think it is too plain to need argument that defendant was guilty of negligence in carrying the passenger by his destination, and landing him at a point fraught with so much danger as the one in question was. No authorities are cited on this proposition, and we think none can be found that will excuse the company for this transgression of duty."

DILLON v. NASSAU ELECTRIC RAILROAD COMPANY.

Supreme Court, New York, Appellate Division, Second Department, March, 1901.

COLLISION BETWEEN AMBULANCE AND STREET CAR — RIGHT OF WAY — ORDINANCE — ERRONEOUS INSTRUCTION. — In an action to recover damages for injuries sustained in a collision between an ambulance and a street car of defendant in which plaintiff was a passenger, the ambulance being under the jurisdiction of the department of health, but

not belonging to it, it was error to charge that the ambulance had the right of way under a city ordinance, as the ordinance provided that an ambulance of the department of health should have the right of way in the streets.

APPEAL from Trial Term, Kings County.

Action by Catherine Dillon against the Nassau Electric Railroad Company. From an order setting aside a verdict in favor of plaintiff and granting a new trial, plaintiff appeals. *Judgment affirmed.*

"A city ordinance provided that an ambulance of the department of health should have the right of way in the streets. Plaintiff sustained injuries in a collision between an ambulance and a street car of defendant in which she was a passenger. The ambulance was under the jurisdiction of the department of health, but did not belong to it."

Argued before GOODRICH, P. J., and WOODWARD, HIRSCHBERG, JENKS, and SEWELL, JJ.

JAMES C. CROPSEY, for appellant.

JOHN L. WELLS, for respondent.

PER CURIAM. — We cannot say that the charge to the effect that the ambulance had the right of way may not have influenced the jury to some extent. The ordinance gives the right of way only to "ambulances of the department of health." There was not sufficient evidence here to establish the fact that this ambulance was within the ordinance. If the ordinance relates to all ambulances, there is no reason apparent why general words should not be used embracing all, for it is assumed that all the ambulances in use are in some sense under the jurisdiction of the health department. The learned trial justice, on reflection, decided that his ruling was erroneous, and we see no reason to disturb that conclusion. The order setting aside the verdict and granting a new trial should be affirmed.

Order setting aside verdict and granting new trial affirmed; costs to abide the event. All concur.

PILKY v. HARROWER.

Supreme Court, New York, Appellate Division, Third Department, March, 1901.

EMPLOYEE INJURED BY FALL OF PLANK FROM SCAFFOLDING IN MILL — QUESTION FOR JURY. — **In an action to recover damages for injuries sustained by plaintiff while at work in defendant's mill, due to the fall of a plank from some temporary scaffolding, it appeared that the jar of**

the machinery kept the plank moving over plaintiff, that she moved the plank so that it would not fall on her, that she called the foreman's attention to it, who fastened it with a nail and told plaintiff that it could not fall, but a few days later the plank slipped and injured plaintiff. *Held*, that the question of defendant's negligence should have been submitted to jury, and error to nonsuit.

APPEAL from Trial Term, Montgomery County.

Action by Jane Pilkey against Lewis E. Harrower. From a judgment in favor of defendant, plaintiff appeals. *Judgment reversed.*

Argued before PARKER, P. J., and KELLOGG, EDWARDS, SMITH and CHASE, JJ.

H. V. BORST, for appellant.

EDWARD P. WHITE, for respondent.

CHASE, J. — The plaintiff was an employee in the defendant's knitting mill. Her work was seaming wrappers, and in performing that work she was seated at a table in front of a seaming machine, which was run by power that came from a shaft overhead. When she came to her work on Monday morning before the accident, she found that a temporary scaffolding had been erected by the defendant for the purpose of putting up or fixing shafting over the place where she worked. There was a row of posts extending through the center of the room, which were about ten feet apart, and to each of these posts was fastened one end of a bracket, and the other end of the bracket was fastened to pieces that went up to the timbers overhead. These brackets were boards one inch thick and about three to five inches wide. Upon these brackets were laid planks, the one over plaintiff being about twelve or fourteen feet long, two and one-half inches thick, and one and one-half feet wide, and it had no center bracket under it. All of the other planks were longer, and had center brackets under them. The jarring of the machinery in the mill kept the plank, that subsequently fell, moving to plaintiff's right. Plaintiff got up on a chair twice, and pulled the plank over so that it would not fall on her. The foreman then came in the room, and the plaintiff called his attention to the plank. She said to him, "That plank over my head is loose, — not nailed, — and I want you to take it away or fasten it." He said, "That plank can't fall." She said, "It can, for I have got up twice and pulled it over this morning." He said, "That can't fall." He went away and got a hammer and nail to fasten it, and when he returned he reached up from the floor as far as he could, and plaintiff heard him pounding where the plank rested on the bracket. The plaintiff then continued her work under the plank, and did not pay any further attention to it. Men were at work on the scaffold,

passing back and forth, each day from Monday until Saturday. On Saturday morning the left end of the plank slipped off the bracket and fell, and plaintiff was injured. This plank was in no way connected with the manufacture of goods in the mill. At the close of plaintiff's evidence, the trial court granted the defendant's motion for nonsuit.

It is conceded that the defendant was required to furnish and maintain for plaintiff a reasonably safe place to work, and that the foreman in what he did represented the defendant. In view of the testimony that the plank was so placed on thin board brackets at each end of the plank only, and in such a way, that the jar of the mill caused the plank to move to the right, and that the same would necessarily have fallen if not in some way prevented, and that the same, after an attempt to fasten it by one nail, actually did fall, when no one was on it, and by the end slipping off the bracket in the same way that it had slipped before, this presented a question of fact as to the defendant's negligence that should have been presented to the jury.

Judgment reversed, and a new trial granted, costs to appellant to abide the event.

WABASH RAILROAD COMPANY v. FOX.

Supreme Court, Ohio, February, 1901.

RAILROAD EMPLOYEE KILLED — JURISDICTION — EMPLOYERS' LIABILITY ACT — RAILROAD COMPANIES—FOREIGN STATUTES. — 1. In order to give the courts of Ohio jurisdiction to adjudge a cause brought by an administrator of one who is alleged to have been in the employ of a railroad corporation and killed by its negligence in another state, it must, by force of sec. 6134a, Rev. St., be shown that such state allows the enforcement in its courts of the statute of this state of like character. It is not sufficient to show merely that the courts of that state entertain actions to recover for wrongful killing in another state.

2. Where an act of the legislature of a sister state gives the personal representative of one who has been killed by the wrongful act of another a cause of action to recover in all cases in which the deceased could have maintained an action had he lived, and a subsequent act by its provisions regulates the liability of corporations other than municipal for personal injuries to persons employed by them, fixes the rules of evidence which shall govern in such cases, and provides that the decisions or statutes of other states shall not be pleaded or proven as a defense, both acts are to be treated as in *pari materia* in determining whether, under sec. 6134a, Rev. St., the laws

of such sister state allow the enforcement in its courts of the statute of Ohio of like character.

3. The enforcement by the courts of such sister state of the acts relating to the liability of corporations for injuries received by employees of such corporations through their negligence, mentioned in the last preceding paragraph, is not the equivalent of the enforcement of the statute of this state of like character.

4. The courts of Ohio have not jurisdiction to hear and determine a suit brought by the administrator of an employee of a railroad company to recover for the wrongful death occurring from the negligence of the company in Indiana.

(Syllabus by the Court.)

ERROR to Circuit Court, Lucas County.

"The action below was brought in the Court of Common Pleas of Lucas, by Mary J. Fox, as administratrix of Jesse F. M. Fox, deceased, against the Wabash Railroad Company, to recover for the death of the decedent, alleged to have been occasioned by the negligence of the defendant company. The accident occurred in the yard of the company's road at the city of Ft. Wayne, in the State of Indiana. Upon trial a verdict and judgment were recovered in that court, which judgment was affirmed by the Circuit Court. Error is here prosecuted by the company to both judgments. *Judgment reversed.*"

SMITH & BECKWITH, for plaintiff in error.

E. L. TWING and MARSHAL & FRASER, for defendant in error.

SPEAR, J. — A question at the threshold of the case is raised respecting the jurisdiction of the Ohio court to entertain the action, objection being made that, by force of the statutes of this State and of Indiana, the courts of this State may not entertain an action by the personal representative of an employee against a railroad company where the injury arose from the negligence of the company in the latter State, and death has ensued. It being conceded that the right of action rests wholly upon statutory law, not being authorized by the common law, consideration of the question involved here requires an examination of the statutes of the two States bearing upon the subject.

Section 285 of the Revised Statutes of the State of Indiana reads as follows:

"Sec. 285. [Action for Death of Another, Limitation.] When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. This action must be commenced within two

years. The damages cannot exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The title of the Indiana act of March 4, 1893, known as the "Employers' Liability Act," is as follows: "An act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other States shall not be pleaded or proven as a defense in this State; provided, further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Approved March 4, 1893.)" Then follow provisions specifying the conditions under which the employee may recover of the company for injuries occasioned by its negligence, and among others where the injury is caused by the negligence of any person in the service of the company who has charge of a locomotive. Sections three and four of the act are as follows:

"Sec. 3. The damages recoverable under this act shall be commensurate with the injury sustained, unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions; provided, that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

"Sec. 4. In case any railroad corporation which owns or operates a line extending into or through the State of Indiana and into or through another or other States, and a person in the employ of such corporation, a citizen of this State, shall be injured as provided in this act, in any other State where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this State, it shall not be competent for such corporation to plead or prove the decisions or statutes of the State where such person shall have been injured as a defense to the action brought in this State."

Section 6134, Rev. St., is substantially similar to section 285 of the Indiana statute, quoted above, and for that reason need not be reproduced here. It is established law in Ohio, however, that section 6134 does not extend to wrongful acts causing death outside

of this State, and that prior to the passage of section 6134a, Rev. St., no action by an administrator for such cause could be maintained in our courts. That section, which was enacted May 21, 1894, reads as follows:

"Sec. 6134a. [Right by Statute of Other State, Territory or Country Enforced.] Whenever death has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other State, territory, or foreign country, such right of action may be enforced in this State in all cases where such other State, territory or foreign country allows the enforcement in its courts of the statute of this State of a like character; but in no case shall the damages exceed the amount authorized to be recovered for a wrongful act or default in this State, causing death. Every action brought under this act where the death has already occurred shall be commenced within one year from the passage of this act; and in all other cases, within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country."

It is apparent from this section that a condition to the right to maintain such action in this State, where the injury occurred in another State, is that such State allows the enforcement of the statute of this State of like character; that is, if by the laws of such foreign State our statute will be enforced in an action based upon alleged death from negligence occurring in Ohio, then a party may maintain an action of like character here where injury was received in such other State, otherwise not. It is apparent, also, that if section four of the act of Indiana heretofore quoted (the act known as the "Employers' Liability Act") applies to this case, then the statute of Ohio would not be given force in Indiana, for the specific provision is that, in a suit brought by a citizen of that State, an employee of a railroad company operating a line in that and another State, to recover for an injury inflicted in such other State, the corporation shall not plead or prove the decisions or statutes of such State as a defense. No such limitation upon the right of defense is to be found in any statute of Ohio.

It is insisted that this section does not apply because it relates to suits for injury by the employee only, and not to suits for death by a personal representative, as the case at bar; that is, it applies only to a case of violation of contract by the employer, and hence is simply declaratory of the common law that the law of the place where the contract is made governs. But it is further insisted, if this were not so, that the wording of our Ohio statute does not

prevent our courts from taking jurisdiction because the substance of it is that whenever a foreign State will entertain an action for death occurring in our State, then, by the clear provisions of section 6134a, the courts of our State will entertain like actions for death caused in such other State. And, inasmuch as section 285 of the Indiana statute and section 6134 of our statute, each providing for a case of death, are similar, it is clear that the courts of that State would entertain an action for death occurring in this State.

It is difficult to dissever these Indiana statutes. They both relate to a recovery for an injury to an employee arising from the negligence of the company. That which gives a right of action to the representative where the employee does not survive gives such right under circumstances which would have given the employee such right had he survived, and in no other. That the right of the representative to maintain the action is predicated upon the right which the injured person would have had, and is no broader, is distinctly held in Helman *v.* Railway Co., 58 Ohio St. 400, 50 N. E. Rep. 986. Hence, in order to determine whether the representative would have such right of action against the company, recourse must be had to the employers' liability act to determine what conditions must obtain before the employee could maintain an action had he survived. The two, therefore, are in *pari materia*; they go together. This seems to have been the intention of the framers of the later act as expressed in section three by the provisions that the right of action, when death results, shall survive to the representative, and shall be governed in all respects by the law in force as to such actions, which, of course, includes section 285. And, taking both the acts together, it seems plain that the test of liability against the company which the Indiana courts will recognize is found in the Indiana statute, and not in any Ohio statute or decision. In other words, Indiana law prevails; Ohio law is not considered. If, then, the later act is to be regarded at all in arriving at an understanding of the law of Indiana in a case of death, what warrant is there for excluding section four from consideration? The "suit for such injury," specified in the section, must mean any suit for such injury. It may be brought by the employee if he be alive, but, if not, then his representative, under favor of section 285, may maintain the action; and if prosecuted by the injured employee to judgment, and that be reversed, and he die, then the action will survive to his legal representative. If the claim of defendant in error be correct, and this section is to be excluded from consideration in case death has ensued, let us see how it would result practically. A suit is brought direct by an employee injured in another State

through which the interstate line passes, and as to his cause of action the section will prevent the company from setting up any decision or statute of this State where the accident occurred as a defense. Another suit for an injury to another employee, who by the same negligence was killed, is brought by his representative, and as to such cause of action no inhibition as to defenses exists. A similar condition would arise in case of a trial of a cause revived in the name of the representative after judgment in favor of the employee had been reversed. It seems not reasonable to conclude that the lawmakers of our sister State intended any such discrimination as between one who is merely injured and the widow and next of kin of one who was killed outright.

Nor is there ground for saying that our statute (section 6134a) is satisfied by the mere entertaining by the courts of another State of a cause of action for death occurring in our State. Such is not the language of the law. It is not the entertaining of the suit that is stipulated for, but enforcement of our statute of like character. This means that it is the law of Ohio which the sister State will enforce; not necessarily the law of that State, for where there is an essential difference, as has already been pointed out, it cannot be said that by enforcing their own law the court of the other State is enforcing our statute. Our statute rests upon the ground of reciprocity, which is based upon the idea of comity, and the very essence of reciprocity implies that each State, as to the subject-matter, shall have and enforce identical laws; not simply provisions, which may be in many respects similar, but in all essential particulars the same. It seems to us clear that the laws of Indiana, while they permit the bringing of actions in the courts of that State to recover for death occurring in another State, require the determination of the rights of the parties by the provisions of their own laws, but do not enforce the laws of the State where the injury was committed.

Attention is called by counsel for defendant in error to the case of Railroad Co. *v.* Hosea, 152 Ind. 412, 53 N E. Rep. 419. We are unable to see that the decision aids their contention. It is true the court sustained an action against the company for death occurring in Kentucky, but it is equally true that the court was guided by the law of Indiana, and enforced that law. Indeed, the reference to the subject of Kentucky law in the last paragraph of the opinion indicates that, as the counsel had not argued in their brief whether the complaint should be determined by the laws of Kentucky or of Indiana, they had waived it.

But, if the later act is to be wholly excluded from consideration,

a result would seem to follow entirely fatal to the action, although on a different ground. The negligence complained of is that of a locomotive engineer. The deceased was a brakeman of another train. By the law of Indiana as it stood before the passage of the employers' liability act, the engineer was a fellow-servant with the brakeman; hence there would be no liability on the company for his acts. Spencer *v.* Railway Co., 130 Ind. 181, 29 N. E. Rep. 915. So it would appear that plaintiff below was compelled to rely upon the act referred to as a part of her cause of action, and it was relied upon; for we find parts of the act set out in the petition.

The question of jurisdiction was properly made at the trial. We are of opinion that, under the laws of the two States, applicable to the cause of action of the plaintiff below, that action cannot be maintained in an Ohio court, and that the courts below erred in holding otherwise. This conclusion renders it unnecessary to determine the other assignments of error presented by the record and argued by counsel. The judgments below will be reversed, and, inasmuch as the Court of Common Pleas had not jurisdiction to entertain the action, final judgment of dismissal will be entered here. Reversed.

SHAUCK, Ch. J., and BURKET and DAVIS, JJ., concur.

BENTON v. CITY OF PHILADELPHIA.

Supreme Court, Pennsylvania, February, 1901.

BICYCLE RIDER INJURED BY RIDING INTO DITCH IN PARK PATHWAY — CONTRIBUTORY NEGLIGENCE. — In an action to recover damages for injuries received by plaintiff by being thrown from his bicycle while riding down hill on a drive in a public park, the accident being caused by riding into a ditch which extended part way across the path, it appeared that plaintiff could have seen the ditch if he had been looking where he was going, but instead he was looking down trying to catch his lost pedal as it came around. *Held*, that plaintiff was guilty of contributory negligence (1).

APPEAL from Court of Common Pleas, Philadelphia County.

"Action by George V. Benton against the City of Philadelphia for injury received by being thrown from his bicycle while riding down hill on a drive in Fairmount Park on a clear day. The accident was occasioned by his riding into a ditch extending part way

1. For other actions relating to Bicycle Accidents, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

across the path. There was nothing to have prevented his seeing it if he had been looking where he was going; but he had lost his pedal, and was looking down trying to catch it as it came around."

From judgment for defendant, plaintiff appeals. *Judgment affirmed.*

THOMAS A. FAHY, for appellant.

SAMUEL CHEW and HOWARD A. DAVIS, Assistant City Solicitor, and JOHN L. KINSEY, City Solicitor, for appellee.

PER CURIAM. — The court below entered a compulsory nonsuit, and refused, on motion, to take it off. The ground of the nonsuit was the contributory negligence of the plaintiff, and this was fairly established by his testimony. He was riding on his bicycle at the time he was injured, and, if he had given proper attention to the operation of it, and had looked where he was going, he could have easily and safely avoided the occurrence of which he complains. It was an unfortunate occurrence, but not such as would authorize a judgment against the defendant. The assignment of error is dismissed.

Judgment affirmed.

BURKE v. UNION TRACTION COMPANY.

Supreme Court, Pennsylvania, March, 1901.

COLLISION BETWEEN VEHICLE AND STREET CAR — CONTRIBUTORY NEGLIGENCE. — In an action for damages for injuries sustained in a collision between a vehicle and street car, it appeared that plaintiff checked his horse almost to a stop and looked as he reached the house line of a street, but afterwards gave no further attention to the cars, and then drove on thirty-two feet, not quickly, but slowly, to allow a wagon to pass in front of him, and went directly in front of a moving street car. *Held*, that he was guilty of contributory negligence in not looking again in order to avoid danger (1).

1. For other actions relating to Collisions between Vehicles and Street Cars, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

See also note on Collisions on Street Railroads, in 8 AM. NEG. REP. 240–246.

Collision between vehicle and street car — Motorman's Negligence — Evidence. — In HORGAN *v.* JONES ET AL. *(California, February, 1901)*, 63 Pac. Rep. 835, collision between wagon and street car, judgment for plaintiff was affirmed. It appears (as per opinion of Temple, J.), that on the day of the accident "an electric car was descending from Broderick on the southerly track easterly towards Devisadero street. A four-horse team, hauling a heavy but unloaded truck, was descending on the southerly side of the street, having its northerly wheels very near, but not on,

APPEAL from Court of Common Pleas, Philadelphia County.

Action by Thomas Burke against the Union Traction Company. From judgment for defendant, plaintiff appeals. *Judgment affirmed.*

JOSEPH MACGREGOR MITCHESON, for appellant.

THOMAS LEAMING, for appellee.

FELL, J. — The question raised by this appeal is whether the court erred in directing a verdict for the defendant on the ground of contributory negligence. At six o'clock in the evening on December 19th, when the street-car traffic was unusually heavy, the plaintiff was riding in a heavy, covered wagon northward on Sydenham street, which is intermediate between main streets, and crosses Columbia avenue at right angles. Columbia avenue is a wide thoroughfare,

the track. It was in advance of the car, but how far when the car left Broderick street the evidence does not show. When the car was about half way to Devisadero, the conductor of the car thought the truck was about fifty feet ahead. From street to street the block is 412 1-2 feet. The truck was so situated that it must have been obvious to the motorman that the car could not pass without a collision. A collision did occur, which resulted in a serious injury to plaintiff. The suit is against the owner of the street railway; Lidstrom, the motorman; and against Jones and King, owners of the truck, and Norman, the driver of the truck. The action is so brought upon the theory that the negligence of all contributed to the injury. The leaders of the team ran down the street and against plaintiff. At the trial the appellants admitted all the facts necessary to establish the case for the plaintiff, except negligence on the part of such defendants. Of course, it does not matter how negligent the driver of the truck may have been, if there was proof to sustain the verdict to the effect that the motorman was also guilty of negligence which contributed directly to the injury. In other words, there is no purpose in the inquiry as to whether the driver of the truck was guilty of mere contributory negligence, such as would have prevented him from recovering damages for personal injuries against the railway company. The real contention of the appellants is that the injury resulted solely from the negligence of the driver of the truck, and that the motorman was not negligent. * * * The conductor, who was a witness for plaintiff, testified that "the track was dry on that day, and a reversed current might have stopped the car in thirty feet." Commenting on the evidence, the court said: "The switch is about twenty feet from Devisadero street, and the grade is as heavy there as upon any part of the hill. The car generally stops without reversing the current, so that, had there been no danger of a collision, the motorman should have been prepared for a stop. The result demonstrated that there was no unusual slackening of the car, but the contrary. Instead of making the usual stop, it carried the heavy truck, overcoming the resistance of the horses as well, more than thirty feet over the level ground on Devisadero street. Instead of carrying the wagon twenty feet, as stated by McCormick, it must have gone more than sixty feet, and was only stopped after leaving the grade. The jury were justified in believing — as I certainly do — from the evidence that the car was not slackened at all by the attempt to reverse the current, but, to the contrary, that the motorman lost control

on which are two tracks of the defendant's road. When the plaintiff reached the house line on the south side of the avenue, he checked his horse almost to a stop, and looked in both directions, but saw no car approaching. In this position he was thirty-two feet from the north track, and could see 237 feet eastward, in the direction from which came the car by which he was injured. A wagon was coming rapidly west on the north track on the avenue, and, observing that he had not time to cross the street in front of it, he drove slowly ahead, in order to avoid colliding with it. After leaving the house line, he did not again look for a car, but gave his whole attention to the wagon, and to regulating the speed of his horse so that it would go so slowly as not to reach the north track

of the car, and it was precipitated, unchecked by any brakes, upon the truck. In other words, there was gross negligence, or utter incapacity — probably the latter — on the part of the motorman. Norman, the truck-driver, testified that his horses were walking at the rate of from three to four miles per hour. The conductor saw the wagon when the car was about one-half way down the hill, at which time he says the wagon was about fifty feet ahead, and the collision occurred about twenty-five feet above Devisadero. The speed must have been sufficient to overtake the wagon while the latter was going 130 feet, more than six miles per hour. Norman and Zoberbier, the only other witness, agree that the collision occurred when the wagon was about two-thirds of the way down the hill. If this be true, the wagon must have been pushed more than 100 feet, and the speed must have been much greater than six miles per hour. Norman also testified most positively that the bell was not rung at all; that he would surely have heard it if it had been rung, and could easily have avoided the collision had he been notified of the approach of the car in the usual mode. The preponderance of evidence is decidedly in favor of the proposition that the bell was rung, but surely there was evidence before the jury which they were at liberty to adopt to the effect that it was not. On the whole, it seems clear that the verdict and judgment against the appellants are fully sustained by the evidence."

Collision between vehicle and street car — Right of Way. — In NORTH CHICAGO STREET R. R. CO. *v.* SMADRAFF *(Illinois, February, 1901)*, 59 N. E. Rep. 527, collision between vehicle and street car, judgment of Appellate Court (89 Ill. App. 411), affirming a judgment for plaintiff for $5,000 was affirmed. The jury returned a verdict of $7,544 for plaintiff, but as condition for refusing new trial, the court required a remittitur of all but $5,000, and judgment was entered for that sum.) Defendant excepted to refusals to charge as to right of way of street cars. The facts (as stated in opinion by WILKIN, J.), were as follows: "The accident occurred on Dearborn street, immediately north of Monroe, in Chicago. The former street extends north and south, and the latter east and west. There are car tracks of the appellant in both streets. The track on Monroe comes into Dearborn from the west, and by a curve turns into the latter on the east side of the street, and proceeds north. The appellee and her husband were riding in a buggy on the east side of Dearborn street, east of the car track. A train of the appellant, consisting of a grip car and trailer, came up behind them, and the front part of the grip car

before the wagon had passed. When he drove on this track the car was not more than fifty or sixty feet from him. The wagon was struck so near the front that the horse was thrown or dragged under the fender of the car, and the harness entangled in the headlight. The plaintiff was familiar with the locality, and knew that the cars ran very frequently. He testified: "I went slow, and let him go past. Just as I reached the track after I saw the wagon pass, I was going across, and the glare of the car came up, and I never saw it until I saw the light shining on the horse, and it caught the wagon. * * * The glare of the light came on the horse. I simply looked out like that, and I could almost lay my hand on it when I saw it. * * * There was nothing in the world to prevent me from seeing

collided with the left front wheel of the buggy, breaking the wheel, and the buggy sank on the side next the car, and the appellee, who was sitting on that side, fell or was thrown against the car. The question of fact mainly contested between the parties is whether the accident was occasioned by the negligent driving of appellee's husband or by the negligence of those in charge of appellant's train, the evidence on these issues being conflicting. All parties agree that at the point of collision there was, to a greater or less extent, a jam of vehicles in the street. The evidence on behalf of plaintiff below tended to show that by reason of a row of wagons between the car track and the sidewalk the outer wheel of the buggy had to go on one of the tracks, and that the gripman, contrary to the directions of the policeman on duty there, negligently ran into it. The defendant insisted, and the evidence offered on its behalf was to the effect that the gripman started forward at the command of the policeman, and that as he approached the buggy, which was not then on the track, the driver, plaintiff's husband, suddenly turned the horse to the right, which movement cramped the left fore wheel, throwing it in the way of the car, resulting in the injury complained of. In this state of the evidence we think the refusal of the foregoing instruction was not error. In the first place, the major proposition is too broadly stated. Although street cars have a superior right of way to the general travel on streets at places other than crossings, to the extent that those traveling by other means must get off the tracks and give the right of way to moving cars, for the reason that they can get off the track, whereas the cars cannot, still the general public have the right to use and travel upon the entire street, including that portion of it on which the car tracks are laid, and are in no sense to be treated as trespassers for so doing. It is therefore not true that street cars have, at 'all times and under all circumstances, a superior right of way along their lines except at street crossings.'" Judgment affirmed. MAGRUDER, J. (dissenting), said: "I do not agree to that part of the opinion which holds that 'street cars have a superior right of way to the general travel on streets at places other than crossings.' The public streets belong to the people, and the humblest teamster has as much right to travel thereon, or on any part thereof, as the cars of any street-railway company. There is no such thing as a 'right of way' in a public street vested in a street-car company."

Collision between vehicle and street car at street crossing — Damages. — In MOWBRAY *v.* BROOKLYN HEIGHTS R. R. CO. *(New York Supreme Court, Appellate*

it, but, when I didn't see it, I didn't see it, that is all. Then I didn't look for it after that. I kept looking at the wagon."

Electric street railway companies have not the exclusive use of their tracks, but in their use their rights are superior to those of the traveling public, and their cars have the right of way. No one is warranted in assuming that if he first reaches the crossing he may go on, and that the whole duty of care and vigilance is then cast on the motorman. The duty to look for an approaching car is an absolute duty, and failure to do so is negligence *per se*. This duty is not performed by looking when first entering on the street, but continues until the track is reached. Ehrisman *v.* Railway Co., 150 Pa. St. 186, 24 Atl. Rep. 596; Omslaer *v.* Traction Co., 168 Pa. St.

Division, Second Department, March, 1901), 69 N. Y. Supp. 435, collision between vehicle and street car, judgment for plaintiff for $3,500 was affirmed. WOODWARD, J., in delivering the opinion of the court, said: "This is an action to recover damages for personal injuries, alleged to have been sustained through the negligence of the defendant. There was a conflict of evidence as to the circumstances surrounding the accident, but if we accept the statement most favorable to the plaintiff, who has the verdict of a jury, there can be no doubt of his right to recover. The accident occurred at the intersection of Fulton and Carlton avenues, in the borough of Brooklyn. The plaintiff was crossing Fulton avenue, driving a team attached to a light covered carriage. He was driving at a slow pace, described by the witnesses as a 'jog,' and, when within about eight or ten feet of the downtown track of the defendant's railroad, he looked to the westward, and saw defendant's car approaching at a rapid rate. It was at that time from 175 to 200 feet distant, and was approaching a crossing where the defendant owed the duty of having its car under control. The plaintiff continued on over the crossing. Just as his horses reached the uptown track he looked again. The car continued to approach, still traveling, as he says, very fast, upon the uptown track. At this point he reached for his whip, and struck the horses, for the purpose of getting out of the way; but he was a little too late, the defendant's car striking the rear wheel of the carriage, throwing the plaintiff out, and causing the injuries complained of in this action. It has never been held in this state, so far as we are aware, that it is negligent, as a matter of law, for a person driving upon the highways to attempt to cross in front of an advancing car under the circumstances described by the plaintiff and his witnesses, and it was therefore a question of fact to be determined by the jury. The rule of law was correctly stated by the court at trial term. There was no exception to the charge, and the verdict of the jury upon this point is conclusive. See Weidinger *v.* Railroad Co., 40 App. Div. 197, 57 N. Y. Supp. 851. We are unable to concur in the suggestion that the damages awarded by the jury are excessive. The evidence warrants the conclusion that the plaintiff, a man about fifty years old at the time of the accident, has been permanently injured; that his condition has been growing progressively worse from the time of the accident. He has contracted doctor bills aggregating nearly $600, and a verdict for $3,500 is not so unreasonable as to warrant this court in interposing its judgment for that of the jury." Judgment affirmed.

519, 32 Atl. Rep. 50; Smith *v.* Electric Traction Co., 187 Pa. St. 110, 4 Am. Neg. Rep. 726, 40 Atl. Rep. 966. When a person about to cross the track of a steam railroad has stopped, looked, and listened, at an apparently proper place to see and hear, the question as to whether there was a second place where he should have stopped, if at all in doubt, is for the jury; but this question cannot arise in the crossing of the tracks of electric roads in cities, where the duty is to look just before crossing. Ehrisman *v.* Railway Co., *supra.* The plaintiff checked his horse almost to a stop and looked as he reached the house line of the street, and afterwards gave no further attention to the cars. He drove on thirty-two feet, not quickly, to avoid danger, nor at an ordinary speed, but slowly, to allow a wagon to pass in front of him, and went directly in front of a moving car. If he had looked again after he was on the avenue, he would have seen what his witnesses saw, — that a collision was inevitable. It was his duty to look again, and his disregard of this duty was properly held to prevent a recovery in this action against the company.

The judgment is affirmed.

EASLER v. SOUTHERN RAILWAY COMPANY.

Supreme Court, South Carolina, April, 1901.

PERSONAL INJURIES — PHYSICAL EXAMINATION — STATUTE. — In an action to recover damages for personal injuries, defendant's motion requiring plaintiff to submit to a personal examination by defendant's physician, to enable the latter to testify as to the extent of plaintiff's injuries, was properly denied, there being no statutory provision empowering the court to order the physical examination of such a party (1).

PHYSICAL EXAMINATION — MOTION PAPERS — CODE. — Where a notice was served on plaintiff's attorney that defendant would apply for an order requiring plaintiff to be personally examined by defendant's physician, but the moving papers did not conform to the provisions of the Code, secs. 391, 392, the motion for such examination was properly refused.

APPEAL from Common Pleas Circuit Court of Lexington County.

Action by R. T. Easler, an infant, by J. P. Easler, his guardian *ad litem*, against the Southern Railway Company. From an order denying defendant's motion that the court require plaintiff to sub-

1. See note of previous decision in the Easler case, in 9 AM. NEG. REP., 582, *ante.*

mit to a personal examination by defendant's physician, to enable the latter to testify as to the extent of plaintiff's injuries, defendant appeals. *Order affirmed.*

B. L. ABNEY and E. M. THOMSON, for appellant.

G. T. GRAHAM and RAGSDALE & RAGSDALE, for respondent.

GARY, A. J. — This action was commenced in Fairfield county on 25th January, 1900, but on motion was transferred to Lexington county. The facts are substantially the same as those in the case of Easler *v.* Southern Ry. Co. (in which the opinion of this court was recently filed), 9 Am. Neg. Rep. 582 (*ante*), 37 S. E. Rep. 938. On 6th September, 1900, a motion was made before his honor D. A. Townsend, presiding judge at that time in the Fifth circuit, at his chambers in Camden, S. C., for an order requiring the plaintiff to permit and allow a personal examination to be made of him by a physician, for the purpose of testifying as a witness in the cause in behalf of the defendant. The motion was made upon the following notice to the plaintiff's attorneys: "Please take notice that we will apply to Hon. D. A. Townsend, presiding judge in the Fifth circuit, at his chambers at Camden, S. C., on the 6th day of September, 1900, at one o'clock, p. m., or as soon thereafter as counsel can be heard, for an order requiring the plaintiff, R. T. Easler, to permit and allow Dr. B. W. Taylor, a physician and surgeon at Columbia, S. C., where he resides, to personally examine the said plaintiff, R. T. Easler, as to his personal injuries, and as to the causes, in a medical sense, producing the same, and the nature and extent of the same, on account of which the above-stated action has been brought against the said defendant, Southern Railway Company; that such personal inspection and examination of the said plaintiff, R. T. Easler, is for the purpose of enabling the said defendant to properly defend said action, and without such examination the defendant will be wholly dependent upon the statements of the plaintiff and of his own physician; and that this examination is sought for the purpose of enabling the said Dr. B. W. Taylor to testify as a witness in this case. You will further take notice that such motion will be made upon the complaint and answer filed in said cause, and upon the affidavit hereto attached." His honor the circuit judge refused the motion on the ground that the court was without power to grant such an order. The defendant appealed from said order, upon exceptions raising the question whether the court had the power to grant the said order.

Sections 390–395 of the Code are as follows:

"Sec. 390. No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor

shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

"Sec. 391. A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

"Sec. 392. The examination, instead of being had at the trial, as provided in the last section, may be had at any time before trial, at the option of the party claiming it, before a judge of the court on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise But the party to be examined shall not be compelled to attend in any other county than that of his residence or where he may be served with a summons for his attendance.

"Sec. 393. The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

"Sec. 394. The examination of the party thus taken may be rebutted by adverse testimony.

"Sec. 395. If a party refuse to attend and testify, as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out."

The remedy provided by the Code has superseded that formerly allowed in the court of equity for the examination of a party to the action, in behalf of the adverse party, by a bill of discovery. In the case of Hall *v.* Joiner, 1 S. C., at page 190, the court says: "As a bill of discovery alone, it cannot, independent of other equitable grounds of relief, be maintained. The right to examine the parties to an action, as witnesses, conferred by statute, affords an adequate remedy at law for the class of cases in which a remedy was formerly allowed in equity on the ground of the necessity of a discovery. In this State the exclusion of courts of equity from jurisdiction in cases in which an adequate remedy is conferred at law rests on the statute. Eno *v.* Calder, 14 Rich. Eq. 154; Dunkin, Ch. J. Consequently a new remedy at law operates to destroy the pre-existing remedies in equity allowed for the want of such legal remedy." See, also, 6 Enc. Pl. and Prac. p. 739. In New York, when a statute was passed enabling the court to grant an order for the physical examination of the plaintiff by a physician before the trial of the case, it was incorporated as an amendment to that section of the Code relating

to the examination of a party to the action in behalf of the adverse party. In the case of Lyon *v.* Manhattan Ry. Co., 142 N. Y. 298, 37 N. E. Rep. 113, the court held that the physical examination allowed by said amendment was to be made in accordance with the provisions of the Code as to the examination before trial of a party to the action in behalf of the adverse party. Mr. Justice O'Brien, delivering the opinion of the court, says: "* * * How is it possible for medical experts to make a physical examination in a case like this, or, indeed, in any case, by merely observing the external marks, or indications of personal injury or disease? The term itself implies not only such observation, but an inquiry, by means of questions and answers, as to the cause, nature, character, and extent of the disability. Mere external appearances are in themselves of no consequence, unless identified and connected with the accident as the cause, and hence disclosure such as ordinarily occur between patient and physician must necessarily accompany the inspection of the injured parts. It is clear, I think, that such an examination as the statute contemplates can never be obtained under the defendants' construction. [The defendants contended that the amendment provided for a physical examination, distinct from the other provisions of the Code.] It must be held that the legislature intended to enact some useful and practical rule, in the administration of justice, that would promote the discovery of truth, and not to do a vain thing. In order to reach this simple and just result, all we need to do is to read the amendment as a part only of the general scheme prescribed by the Code for the examination of parties before trial." The remedy provided by the Code for taking testimony before a trial of the parties to the action, in behalf of the adverse party, is exclusive, and supersedes all remedies existing at the time of its adoption, as hereinbefore stated. There is no statutory provision in this State empowering the court to order the physical examination of such a party.

But there is another reason why the motion was properly refused. Even if the court was empowered to order the physical examination, it was necessary for the proceedings to conform to the foregoing provisions of the Code. The papers, however, upon which the defendant based the motion, show upon their face that it was made independently, and not in pursuance of said provisions. These views render unnecessary the consideration of the question whether the court would have the power, in absence of statutory provisions, to order the physical examination of a party to the action, in behalf of the adverse party, before the trial of the case.

The order of the Circuit Court is affirmed.

STACKER v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Supreme Court, Tennessee, February, 1901.

BOY INJURED AT TURNTABLE — EVIDENCE — RAILROAD COMPANY NOT LIABLE. — In an action to recover damages for injuries to plaintiff, a boy about twelve years of age, whose foot was caught on a turntable, plaintiff testified that he was called by defendant's employees to come to the turntable and assist in pushing an engine around, being corroborated in this by two other boys who were with him. Three of defendant's employees testified that they did not see the boys there, and that they were not called or invited to the turntable; and there was evidence that the boys were often warned to stay away from the turntable. *Held*, that there was sufficient evidence to sustain verdict for defendant (1).

APPEAL from Circuit Court, Montgomery County.

Action by George Stacker against the Louisville and Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. *Judgment affirmed.*

FORT & SCALES, for appellant.

LUCH & SAVAGE, for respondent.

WILKES, J. — This is an action for damages for personal injuries. It was brought by an infant, through his next friend. There was a trial before a jury in the court below, and verdict and judgment for the defendant, and plaintiff has appealed and assigned errors.

The second, third, fourth, and fifth assignments are to the refusal of the court to allow a certain line of testimony, to show the habit and custom of the defendant, and the general conduct of the employees of the road towards children, and their conduct towards plaintiff on previous occasions. The pages of the record where this evidence is to be found, and exceptions made to the ruling of the court thereon, are not given, so that the assignment does not comply with the rules. Looking to the record, however, we find several instances where such evidence was given and disallowed, but in none of the instances does it appear what the witness would have stated if allowed to answer the questions. It is true that counsel, in making his exceptions, said that he expected the witness to state

1. See East Tenn. & Western North Carolina R. R. Co. *v.* Cargille (Tenn.), 9 AM. NEG. REP., 200, *ante*, where railroad company was liable for injury to child at turntable.

See Note on Turntable Cases at end of this case.

further facts, but whether the witness would have met these expectations of counsel does not appear. These assignments, therefore, for both reasons stated, cannot be considered. But, in addition, it appears that plaintiff, George Stacker, was allowed to prove that he had been often called upon to help turn the engine by the employees of the road, so that this testimony, though incompetent, did get into the record.

It is said that the court erred in allowing third persons to state what the boy's mother said to him soon after he was hurt, — to the effect that she had warned him to keep away from the turntable, and that he was hard-headed. The pages where this testimony is to be found are not given, but in examining the record we find that two or more witnesses were asked as to the statements made by the mother but no exceptions were made to the question or answer, so far as we can see from the record, and for these reasons this assignment is not well made.

It is said the court erred in not charging the jury that a minor is only chargeable with negligence to a degree equal to his capacity for discerning danger.

It does not appear that the trial judge was asked to charge this language. He did charge upon the feature of the case presented by this request, and, as we think, correctly, and there is no error in this assignment.

It is said there is no evidence to support the verdict. The plaintiff was a boy about twelve years of age. His foot was caught at a turntable and slightly injured. His version is that he was called by the employees of the road to come to the turntable and assist in pushing the engine around. In this he is corroborated by two other boys about his age, and who, it appears, were with him. On the contrary, three of the company's employees, who were present and handling the engine, state that they did not see the boys there, that they were not called or invited to come to the turntable, and, if they were there, they were so concealed as not to be seen. It appears from the proof that these and other boys had often been warned away from this turntable by employees of the road, and told that it was dangerous; and the evidence tends to show that they kept themselves out of sight of the employees on this occasion, and were not seen until the accident occurred. There were two theories of the case presented to the jury, — one, that the boys were invited or told to come to the engine, and help to push it, by the railroad employees, and plaintiff was hurt while so doing; and the other is that the boys were often warned to stay away from the turntable, and were present on this occasion without the knowledge

of the railroad employees. Both theories were supported by some evidence. The jury has given credit to that of the road, and there is evidence to sustain it and the judgment of the court below is affirmed, with costs.

LIABILITY OF RAILROAD COMPANIES FOR ACCIDENTS TO CHILDREN ON TURNTABLES.

In connection with the preceding case reported (Stacker *v.* Louis. & Nash. R. R. Co. [Tenn.], 61 S. W. Rep. 766), the following cases will be of interest on the question of liability for exposure of dangerous machinery to which children may be attracted. The majority of the authorities cited in this note are "Turntable Cases."

Liability for exposure of dangerous machinery — Rule in turntable cases.

It is negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery, which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense.

Barrett *v.* So. Pac. Co., 91 Cal. 296, 303; Kansas Central R'y Co. *v.* Fitzsimmons, 22 Kan. 686; Powers *v.* Harlow, 53 Mich. 507; O'Malley v. St. Paul, M. & N. R'y Co., 43 Minn. 289; Nagel *v.* Mo. Pac. R'y Co., 75 Mo. 653; Koons *v.* R'y Co., 65 Mo. 592; Hydraulic Works Co. *v.* Orr, 83 Pa. St. 335; Whirley *v.* Whitman, 1 Head (Tenn.) 610; Sioux City & P. R. Co. *v.* Stout, 17 Wall. (U. S.) 657; Keffe *v.* Milw. R. R. Co., 21 Minn. 207; Hedrick *v.* Ilwaco R. R., etc., Co., 25 Pac. L. Rep. 335; Id., 1 Wash. St. 446; Callahan *v.* Eel River, etc., R. Co., 92 Cal. 89; Westerfield *v.* Levis Bros., 43 La. Ann. 63, (machinery on public place); O'Connor *v.* Ill. Cent. R. Co., 44 La. Ann. 339, (dangerous machinery); Bransom *v.* Labrot, 81 Ky. 638, (lumber pile); East Tenn., etc., R. Co. *v.* Cargille (Tenn.), 9 Am. Neg. Rep. 200.

Fastening of turntable — Ordinary Care — Evidence.

The fact that a turntable was latched in the way such tables are usually fastened, although a matter for the jury to consider in passing upon the question whether defendant exercised ordinary care in the way it maintained the table, is not, of itself, conclusive proof of the fact.

Barrett *v.* So. Pac. Co., 91 Cal. 296; O'Malley *v.* St. Paul, M. & N. R'y Co., 43 Minn. 289; Stout *v.* Sioux City, etc., R. R. Co., 17 Wall. 657, affirming 2 Dill. 294; Doyle *v.* R'y Co., 42 Minn. 79.

Turnable cases — Liability of railroad company.

In Barrett *v.* So. Pac. Co., 91 Cal. 296, an action for injuries sustained by plaintiff, a boy eight years of age, who while playing with other boys on defendant's turntable, had his leg injured while the turntable was being revolved, judgment for plaintiff for $8,500 rendered on verdict in Superior Court, Orange County, was affirmed. The facts (as per opinion by De Haven, J.), were as follows:

"It was shown upon the trial that defendant maintained a railroad turntable upon its own premises in the town of Santa Ana. This table was about 150

yards from defendant's depot, and near its engine-house, and distant seventy-two feet from a public street. It was provided with a latch and slot, such as is in common use on such tables, to keep it from revolving, but it was not protected by any inclosure, nor did the defendant employ any person whose special duty it was to guard it. There were several families with small children residing within a quarter of a mile from the place of its location, and previous to the time when plaintiff was hurt, children had frequently played around and upon it, but when observed by the servants of the defendant were never permitted to do so. At the date of plaintiff's injury he was eight years of age, and on that day he, with his younger brother, saw other boys playing with the turntable, and, giving them some oranges for the privilege of a ride, got upon it, and, while it was being revolved, his leg was caught between the table and the rail upon the head-blocks, and so severely injured that it had to be amputated. The defendant moved for a nonsuit, which motion was denied. This ruling of the court, and certain instructions given to the jury, present the questions which arise upon this appeal."

Defendant contended that it was not negligent in thus maintaining upon its premises for necessary use of its business the turntable, which was fastened in usual and customary manner; that plaintiff was wrongfully upon its premises, and therefore a trespasser to whom defendant did not owe duty of protection. As to this contention, De Haven, J., said:

"This view seems to be fully sustained by the case of Frost *v.* Eastern R. R. Co., 64 N. H. 220. But in our judgment the rule, as broadly announced and applied in that case, cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible, consistently with its proper use. This rule, which only imposes a just restriction upon the owners of property, seems not to have been given due consideration in the case referred to. But the principle as a standard of conduct is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection; a breach of duty, and, in a legal sense, constitutes negligence. Whether, in any given case, there has been such negligence upon the part of the owner of property, in the maintenance thereon of dangerous machinery, is a question of fact dependent upon the situation of the property and the attendant circumstances." Judgment affirmed.

Callahan *v.* Eel River & Eureka R. Co., 92 Cal. 89, was a case, the facts of which were similar to those in Barrett *v.* So. Pac. Co., 91 Cal. 296 (*supra*), and was decided on the authority of that case. In this case the plaintiff was six years of age, and, while playing with other boys on defendant's turntable, had his leg injured. Judgment for plaintiff for $5,000 affirmed.

In Ferguson *v.* Columbus & Rome R'y Co., 77 Ga. 102, it was held that where a railroad company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of such company; and where an infant of ten or twelve years of age resorted to the turntable, and, in riding upon it, was seriously and dangerously injured, the railroad company is liable for damages for such injuries to the infant. And this is so, notwithstanding the father of the infant permitted her to go near the turntable to carry breakfast to a minor brother, who had been left by the father to protect other property of the company than the turntable. The fault of the

father, if any, is not attributed to the infant, the action being brought by the infant herself.

See Ferguson *v.* Columbus & Rome R. R. Co., 75 Ga. 637, for a full report of the "turntable accident case." The Muscogee Superior Court granted a nonsuit, and excluded the child's statements as a part of the *res gestæ*. The Supreme Court reversed the judgment.

In the Ferguson Case, 77 Ga. 102 (*supra*), it was held that where the Superior Court has awarded a nonsuit upon the ground that the evidence did not authorize a verdict for plaintiff, and this judgment was reversed by the Supreme Court, and upon the trial of the case a verdict was rendered for plaintiff, it is error for the Superior Court to grant a new trial on the ground that the verdict is contrary to and without evidence to support it, the facts being substantially the same on the last trial as they were when the nonsuit was granted. Judgment in main case reversed; affirmed on cross-bill of exceptions.

Kansas Central R'y Co. *v.* Fitzsimmons, 22 Kan. 686, was an action for injuries received by plaintiff, a boy twelve years old, while on defendant's turntable. This was the second time that the case was before the Supreme Court. The first judgment rendered in favor of the plaintiff for $3,000 was reversed (18 Kan. 34). The second trial resulted in favor of plaintiff for $500 and costs. Whether the defendant was negligent in leaving in a public place a turntable unlocked and unguarded, and whether plaintiff was negligent in going upon it were questions for the jury to determine. Judgment for plaintiff affirmed.

In Union Pac. R'y Co *v.* Dunden, 37 Kan. 1, where a boy, about twelve years old, received fatal injuries while playing with other boys on defendant's turntable, it was held that although the boy had sufficient intelligence to know it was wrong to trespass upon the turntable, it could not be said that he was guilty of contributory negligence if he had no knowledge that playing on turntables was unsafe or dangerous. Judgment for plaintiff for $3,000 affirmed.

In Keffe *v.* Milw. & St. P. R'y Co., 21 Minn. 207, an action for injuries to plaintiff, seven years old, sustained while playing upon defendant's turntable, which was on its own premises but unguarded, judgment for defendant was reversed, it being held that "the owner of dangerous machinery who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed." (Citing numerous cases).

O'Malley *v.* St. Paul, Minn. & N. R'y Co., 43 Minn. 289, (a turntable accident case, a child six years old being killed while playing on turntable), was a case, in its main features, nearly analogous to Keffe *v.* Milw. & St. P. R'y Co., 21 Minn. 207 (*supra*), the principal difference in the facts being that in the Keffe case the turntable was left unfastened, while in this case the turntable was usually kept fastened, but not sufficiently so to prevent children from easily removing the fastenings. In the O'Malley Case, it was held that the owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it, is under a duty as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them." Judgment for plaintiff for $3,000 affirmed.

In Koons *v.* St. L. & I. M. R'y Co., 65 Mo. 592, child killed on defendant's turntable, judgment for plaintiff was reversed on the erroneous admission of evidence of persons, not experts, as to whether a turntable is a dangerous machine, and for other admissions of opinion evidence.

In Nagel *v.* Mo. Pac. R'y Co., 75 Mo. 653, judgment for plaintiff for $1,050 for death of child, while playing with other children on defendant's turntable, was affirmed. It was held that "it is negligence on the part of a railroad company to omit to secure its turntables so that children cannot revolve them. If a child is injured in consequence of such an omission, the company will be liable, and the fact that the turntable was being revolved by other children at the time will make no difference."

In Atch. & Neb. R. R. Co. *v.* Bailey, 11 Neb. 332, judgment for plaintiff for death of infant daughter, killed on defendant's turntable, was reversed for erroneous instruction as to keeping turntable unguarded, and its situation near highway, the question of defendant's negligence in this respect being for jury to determine.

Among other authorities citing the rule as to negligence in leaving machinery, etc., in places open to children, are the following:

McAlpin *v.* Powell, 70 N. Y. 126, (criticising Sioux City, etc., R. Co. *v.* Stout, 17 Wall. 657); Beck *v.* Carter, 68 N. Y. 283; Graves *v.* Thomas, 95 Ind. 361; Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332, approved in Gramlich *v.* Wurst, 86 Pa. St. 74; Westerfield *v.* Levis, 43 La. Ann. 63; Bransom *v.* Labrot, 81 Ky. 638; Harriman *v.* Pitts., C. & St. L. R. Co., 45 Ohio St. 11; Bridger *v.* Asheville, etc., R. R. Co., 25 S. C. 24; Bates *v.* Nashville, etc., R. Co., 90 Tenn. 35; Evansich *v.* Gulf, C. & S. F. R'y Co., 57 Tex. 126; Ilwaco, etc., Nav. Co. *v.* Hedrick, 1 Wash. St. 446.

Rule in the Federal courts.

The decision in Sioux City & Pacific R. Co. *v.* Stout, 17 Wall. (U. S.) 657, affirming 2 Dill. 294, is the authority followed in the majority of "turntable cases," but it has been criticised in a few of the states, and in a New Hampshire case the ruling was in direct opposition. The Massachusetts authorities also do not follow the ruling. See the Stout Case (next paragraph), and opposing authorities cited in this note, *post*.

Railroad Co. v. Stout.

Sioux City & Pac. R. Co. *v.* Stout, 17 Wall. 657, was an action to recover damages for injury to a child six years old, sustained upon defendant's turntable. The turntable was in an open space, about eighty rods from the railroad company's depot, in a hamlet or settlement of 100 to 150 persons. Near the turntable was a traveled road passing through the depot grounds, and another traveled road thereby. On the railroad ground, which was not inclosed or visibly separated from the adjoining property, was situated the company's station-house, and about a quarter of a mile distant from this was the turntable on which plaintiff was injured. The boy, with two other boys a little older then himself, went to the depot and then to the turntable, to play. The table was not attended or guarded by any servant of defendant, was not fastened or locked, and revolved easily on its axis. In attempting to get upon the table while the boys were revolving it, plaintiff's foot was caught and crushed. On the trial there was a verdict for plaintiff for $7,500. Judgment

affirmed. Mr. Justice Hunt, in delivering the opinion of the court, said, in reference to the charge to the jury as to negligence in management of the turntable: "That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case."

Railroad Co. v. Stout, Criticised.

In Daniels *v.* N. Y. & N. E. R. R. Co., 154 Mass. 349 (turntable case), Lathrop, J., said: "The decision of the Supreme Court of the United States in Sioux City & P. R. Co. *v.* Stout, 17 Wall. 657, rests upon the proposition stated by Mr. Justice Hunt, 'that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.'"

In Daniels *v.* N. Y. & N. E. R. R., 154 Mass. 349, (a turntable case), Lathrop, J., said: "The Court of Appeals of New York has stated, in a well considered case, that it does not uphold the decision in Sioux City & Pac. R. R. Co. *v.* Stout, 17 Wall. 657, and although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. McAlpin *v.* Powell, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire escape, and fell through a trap-door therein which was insecurely fastened. The defendant was the landlord of the house, and it was his duty to keep the fire escape in order. It was held that he owed no duty to one who was using the fire escape for his own pleasure; and that the defendant was not liable."

In Frost *v.* Eastern R. R., 64 N. H. 220, (a turntable case), the court expressly refused to follow the ruling in Railroad Co. *v.* Stout, (*supra*).

Turntable cases — When railroad company not liable.

In Frost *v.* Eastern R. R., 64 N. H. 220, the plaintiff, a boy seven years of age, was injured while playing upon a turntable of defendant's railroad. The ground upon which he sought to recover was, that he was attracted to the turntable by the noise of boys playing upon it. The turntable was on the defendant's land, about sixty feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of Sioux

City & Pac. R. Co. *v.* Stout, 17 Wall. 657. On the question whether the defendant was liable on the ground of an implied invitation, Clark, J., in delivering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

In Daniels *v.* New York & N. E. R. R. Co., 154 Mass. 349, it was held that plaintiff could not recover for injuries sustained while playing with other boys on defendant's turntable which was on defendant's premises, unguarded or unlocked, near the public highway, there being neither an implied invitation for the boy to go on such premises, nor a duty on the part of the railway company other than that of ordinary care in the management of its turntable.

In Gay *v.* Essex Electric St. R'y Co., 159 Mass. 238, it was held that a street railway company was not liable for an injury caused by an unfastened brake to a boy ten years old, who was injured while playing with other children upon cars left standing unguarded for several days on a public street of a city.

In the Gay Case, the court (per Morton, J.), said: "If the cars had been left standing by the defendant on its own premises, near the highway, in the same condition in which they were left standing in the street, it is clear under the decisions of this court that, however attractive they might be to children, if the plaintiff's intestate had been injured by them while at play upon them he would have been a trespasser, and the defendant would not have been liable. Lane *v.* Atlantic Works, 107 Mass. 104, 111 Id. 136; Morrison *v.* Eastern R. R., 126 Mass. 377; McEachern *v.* Boston & Maine R. R., 150 Mass. 515; Daniels *v.* N. Y. & N. E. R. R., 154 Mass. 349."

In Gay *v.* Essex Electric St. R'y Co., 159 Mass. 242, it was held that an action could not be maintained against a street railway company, under Stat. 1886, c. 140, for the death of a boy caused by an unfastened brake on a street car while playing with other children upon cars left standing unguarded for several days on a public street of a city. See same case, 159 Mass. 238 (*supra*).

SAN ANTONIO TRACTION COMPANY v. WHITE.

Supreme Court, Texas, April, 1901.

DEATH OF INFANT BY WRONGFUL ACT — MEASURE OF DAMAGES — ERRONEOUS INSTRUCTION. — In an action by a parent to recover damages for the death of her son, twelve years of age, caused by the negligence of the street-car company, an instruction that plaintiff was entitled to recover whatever pecuniary aid she had a reasonable expectation of receiving

as contributions to her necessities after her son reached his majority, was erroneous, the true measure of damages being compensation for the loss sustained by plaintiff from the death of her son.

ERROR to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Bettie White against the San Antonio Traction Company. From a judgment of the Court of Civil Appeals (60 S. W. Rep. 323) affirming a judgment in favor of the plaintiff, defendant brings error. *Judgment reversed.*

HOUSTON BROS. and R. J. BOYLE, for plaintiff in error.

C. A. KELLER and MASON WILLIAMS, for defendant in error.

WILLIAMS, J. — The judgment from which this writ of error is prosecuted was recovered by defendant in error in the District Court and affirmed in the Court of Civil Appeals (60 S. W. Rep. 323) for damages sustained by her from the death of her minor son, William H. White, caused, as found by the jury, by the negligence of the street-railway company of which plaintiff in error is successor. The only one of the assignments of error which we find it necessary to discuss is that which complains of the charge of the trial judge upon the measure of damages. The plaintiff sought to recover damages for the loss of the services of deceased during minority, and also for the loss of benefits which would have been received by her from him after his majority. The charge upon the measure of damages was as follows: "Should you find for the plaintiff under this charge, then plaintiff would be entitled to recover the pecuniary value of said Wm. H. White's services until he should arrive at the age of twenty-one years, less the cost and expense of his care, support, and maintenance during the remaining period of his minority. And if you believe that plaintiff had a reasonable expectation of receiving from said Wm. H. White, had he lived, considering his disposition and ability, contributions to her wants and necessities after he reached his majority, then plaintiff is entitled to recover whatever pecuniary aid she had a reasonable expectation of so receiving, if any. You are instructed that, if you find for the plaintiff, you must not allow plaintiff anything for the bodily pain and suffering of the said Wm. H. White, or the mental pain and suffering, if any, undergone by plaintiff by reason of the death of said Wm. H. White, and you must not consider the loss of society of said Wm. H. White to plaintiff, but consider alone the money value, if any, of said Wm. H. White, as hereinbefore instructed." The instruction was erroneous, in that it required the jury, in effect, to allow the amount of the pecuniary contributions which they might find the deceased, had he lived, would have made to his mother

after becoming of age. The true measure of damages is compensation for the loss sustained by plaintiff from the death of her son; and what sum, allowed now, will give such compensation, is a question for the jury under all the circumstances of the case. The plaintiff lost the contributions which her son would have made to her, but it does not necessarily follow that nothing short of an amount equal to the sum of such contributions, if paid now, would be compensation. We had occasion to pass upon this question in the case of Railway Co. *v.* Morrison, 93 Tex. 527, 56 S. W. Rep. 745, and a charge in substance the same as that under consideration was held to be erroneous. In that case a special instruction was requested to submit a correct rule, but the charge of the court was held to be erroneous. As the error in this case was a positive one, it is assignable without the request of a special charge. The deceased was only twelve years old when killed, and the plaintiff, had her son lived, would have received none of the contributions for the loss of which she seeks compensation until after eight or nine years had passed, and this makes obvious the error of a charge requiring the jury to allow her in advance the sum which she would have received after such time. The charge in such cases should leave the jury free to allow compensation. It is urged that the instruction, "consider alone the money value of said Wm. H. White, as hereinbefore instructed," so explains and qualifies what preceded it as to remove the objection; but we do not think this is true. This part of the charge refers the jury to the preceding portion to ascertain what the court means by money value. What we have said has no reference to the first part of the charge as to the recovery of value of services during minority.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. LAWS.

Court of Civil Appeals, Texas, March, 1901.

RAILROAD CROSSING ACCIDENT — PERSONAL INJURIES — OPINION OF ATTENDING PHYSICIAN. — In an action to recover damages for injuries sustained by plaintiff's wife who was struck by defendant's train at a street crossing, it was held that it was proper for the physician attending upon plaintiff's wife to give his opinion as to what caused her injuries.

DAMAGES — INSTRUCTION. — Where the petition alleged that plaintiff's wife was unable to perform her ordinary household duties, or to perform

any kind of manual labor, and that said injuries were permanent, and in consequence thereof she was unable to perform labor and earn money, it was not error to instruct the jury that they could allow plaintiff damages for decreased capacity to perform labor.

APPEAL from District Court, Hunt County.

Action by A. L. Laws against the St. Louis Southwestern Railway Company of Texas for injuries received in a crossing accident. From a judgment in favor of the plaintiff, defendant appeals. *Judgment affirmed.*

S. H. WEST and PERKINS, GILBERT & PERKINS, for appellant.

EVANS & ELDER, for appellee.

FISHER, Ch. J. — This is an action for damages arising from injuries sustained by the wife of appellee being struck by the cars of appellant at the crossing of a street in the city of Greenville. Plaintiff recovered judgment in the court below, from which appellant appeals.

We find that the averments of negligence pleaded by appellee in his first amended original petition are substantially supported by the evidence, and find as a fact that the appellant was guilty of negligence as alleged, and that by reason thereof the appellee's wife sustained many of the injuries alleged in the petition. The averments of the petition describing the injuries sustained by appellee's wife were sufficiently definite and certain, and the court committed no error in overruling appellant's demurrers. We do not think the evidence complained of in the fourth assignment of error subject to the objection urged. The question was not leading. There could be little doubt from the evidence that appellee's wife was at the time suffering to some extent, and if she knew that her husband was aware of that fact she could so testify. The only objection urged to the admission of the evidence is based upon the ground that the question asked was leading. It was proper for Dr. Peak, the attending physician who waited upon the wife of appellee, to give his opinion as to what caused her injuries. Permitting the question to be asked the witness Laws and the answer thereto, as set out in the sixth assignment of error, was a matter within the discretion of the court, and we cannot say that the ruling complained of was reversible error. The charge complained of in the eighth assignment of error is not subject to the objection there raised. In view of the facts, it was a proper charge. In response to the questions raised under the ninth, thirteenth, and fifteenth assignments of errors, it is sufficient to say that the general charge of the court did instruct the jury that plaintiff could not recover if he and his wife were guilty of contributory negligence. We decline to pass

upon the question whether the court erred in refusing to give special charges upon this subject, because there is nothing stated in the assignments of errors, or in statements thereunder in the briefs of appellant, which attempts in any manner to set out or state the contents of these charges. The charge of the court on the subject of the appellee being entitled to compensation for the physical pain and mental anguish suffered by his wife is not subject to the criticism urged in the tenth and eleventh assignments of errors. The twelfth assignment of error is not sustained by the record. The assignment is as follows: "The court erred in charging the jury that they could allow plaintiff damages for decreased capacity of his wife to perform labor, because this was not warranted by the pleadings and evidence, and was speculative." There were facts introduced in evidence from which the jury could estimate the damages sustained. The petition alleges "that she is unable to perform her ordinary household duties, or to perform any kind of manual labor, * * * and that said injuries are permanent, and in consequence thereof she is unable to perform labor and earn money." We cannot agree with appellant in the contention urged in the fourteenth assignment of error. The charge of the court limited the plaintiff's right to recover to the causes of negligence alleged in the petition, and, if any further charge was desired upon this subject, the appellant should have requested it. Our findings of fact dispose of the fifteenth assignment of error. There is evidence which shows that appellant was guilty of the negligence alleged, and that the appellee and his wife were not guilty of contributory negligence. We find no error in the record, and the judgment is affirmed.

RUTHERFORD v. TEXAS AND PACIFIC RAILWAY COMPANY.

Court of Civil Appeals, Texas, February, 1901.

BARN DESTROYED BY FIRE FROM LOCOMOTIVE — DUTY OF OWNER — ERRONEOUS INSTRUCTION. — In an action to recover damages for the destruction by fire of a barn and its contents owned by plaintiff, which fire was caused by sparks emitted by a locomotive belonging to defendant, it was error to charge that if plaintiff placed hay in his barn, adjoining or next to defendant's right of way, and had knowledge that combustible material had accumulated on defendant's right of way, he could not recover

for loss of same by fire from passing engines, as such charge was in effect an instruction that plaintiff must forego the use of his property to prevent its destruction through defendant's negligence (1).

APPEAL from District Court, Lamar County.

Action by J. C. Rutherford against the Texas and Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. *Judgment reversed.*

STURGEON & STONE and HILL & MOORE, for appellant.

FLY, J. — Appellant instituted this suit to recover damages for the destruction by fire of a barn and its contents, which were ignited by sparks from a passing locomotive belonging to appellee. The cause was tried with a jury, and resulted in a verdict and judgment

1. For other actions relating to Railroad Fires, from 1897 to date, see vols. 1–9 AM. NEG. REP. and the current numbers of that series of Reports.

See also Note on Liability for Damage by Fire Caused by Sparks from Locomotives, in 8 AM. NEG. REP. 614–619.

Destruction of mill by fire — Sparks from locomotive — Burden of proof — Spark arresters — Due Care — Railroad Company not liable. — In WHITE *v.* NEW YORK, PHILA. AND NORFOLK R. R. CO. *(Virginia, March, 1901)*, 38 S. E. Rep. 180, an action arising out of damages caused by a railroad fire, it was held that the railroad company, having discharged its duty in the matter of proper machinery and appliances, was not liable. The opinion (per Harrison, J.), is as follows: "This action was brought to recover damages for the destruction of a mill and contents, alleged to have been caused by fire communicated from the engine of the defendant railroad company. There were two trials. On the first there was a verdict in favor of the plaintiff, which was, on motion of the defendant, set aside as contrary to the law and the evidence. On the second trial no evidence was introduced, and a verdict rendered in favor of the defendant, which the court refused to set aside. All the evidence adduced on the first trial was duly incorporated in a proper bill of exceptions, and the sole question to be determined is whether or not the Circuit Court erred in setting aside the first verdict and granting a new trial. "In this case the burden is upon the plaintiff to show that the fire arose, as alleged, from sparks emitted by the engine in question. Where the origin of the fire is thus fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had observed every reasonable precaution, and availed itself of the best mechanical contrivances and inventions in known practical use, to prevent the burning of property by the escape of fire. When this has been done, the railroad company has performed its duty, and cannot be held liable. Railway Co. *v.* Rogers, 76 Va. 451; Patteson *v.* Railway Co., 94 Va. 16, 26 S. E. Rep. 393; Kimball *v.* Borden, 97 Va 472, 3 Am. Neg. Rep. 707 n, 34 S. E. Rep. 45.

"It is by no means clear that the fire which destroyed the plaintiff's mill had its origin in sparks thrown from the engine of the defendant. Without passing, however, upon that question, but assuming that the jury were justified in concluding that the fire resulted from that cause, we are of opinion that the defendant has borne the burden

for appellee. Appellant owned a piece of land lying contiguous to the right of way of the railroad company, and on it erected a barn, about fifty feet from the main track, and placed in the barn, some time before the fire, 125 tons of hay. There was testimony tending to show that the fire was communicated by sparks from an engine belonging to appellee, which ignited shucks which had been permitted by appellee to accumulate on the right of way near its track, and was communicated from the shucks either directly to the barn of appellant, or to the house of another, and from that set the barn on fire. Appellant knew the shucks were on the right of way, but persisted in using his barn on his own land for storing his hay.

The court gave the following charge: "If you believe from the evidence that the plaintiff's hay was in his barn, which was next to

thus imposed upon it, and has brought itself within the rule relieving it from liability by showing that its engine was equipped with the most approved spark arrester, that the same was in proper repair, and that the engine was operated with reasonable care and skill by competent employees.

"It appears that about two weeks before the fire the engine in question was returned to the defendant from the Baldwin Locomotive Works, shown to be the largest in the world, and to have the highest reputation in this country for turning out first-class work of the kind. It had been sent to these shops for general repair, and it appears from the evidence of those who did the work that the engine left their hands in first-class order and equipped with the most approved method for preventing the escape of sparks. It further appears that during the two weeks immediately preceding the fire the engine was repeatedly examined with care by the inspector of engines, the last inspection being on the day the mill was destroyed, and each time the spark arrester was found to be in good condition. It further appears that, in accordance with the custom of the company, the efficiency and equipment of this engine was successfully tested and established by being used to haul heavy freight trains with forty and fifty cars before being used for the passenger service in which it was engaged on the occasion of the fire. This evidence is corroborated by photographs of the spark arrester taken soon after the mill was destroyed. The run made by this engine was from Cape Charles to Delmar, a distance of ninety-five miles. The evidence shows that a large part of this distance is through woodland, and that along the right of way on the lands adjacent thereto are sedge fields and other inflammable materials, such as dead leaves and dead branches of trees. Notwithstanding these conditions, so inviting to fire from the sparks of a passing engine, it is an established fact in the case that no fire occurred at any point along the entire route, other than that alleged in this case, as the result of sparks emitted by the engine in question, after it came from the repair shops.

"Without prolonging this opinion with further recital of the evidence, it is sufficient to say that it satisfactorily appears that the railroad company had discharged its duty in the matter of proper machinery and appliances, and therefore could not be held responsible for the alleged fire. For these reasons the judgment of the Circuit Court must be affirmed."

or adjoining the right of way owned or controlled by the defendant, where it was burned, and if plaintiff knew at the time that he placed said hay in said barn that combustible matter had accumulated and was accumulating on the right of way of the defendant, if there was such combustible matter on such right of way, or on the land of the parties adjoining the land of plaintiff, and that said combustible matter, if any, was liable to be ignited and burned, and fire communicated to his property, and it was thereby destroyed; and if you find that such placing of said hay where it was burned, and that so leaving said hay, was such an act or omission as a person of ordinary prudence would not have done, in view of the probable danger of fire from passing engines, if such danger was probable; and if you further find from the evidence that such placing of the hay in said barn, and leaving it exposed, was a proximate cause, which, concurring with the negligence of defendant, if you find that the defendant was negligent, produced the fire which destroyed the property of plaintiff, — then the plaintiff cannot recover, no difference how negligent in the matter you may find the defendant to have been." The charge was in effect an instruction that plaintiff must forego the use of his property, to prevent it from being destroyed through the negligenec of the railroad company. Such is not the law. The railway company, by obtaining a right of way through the country, does not obtain the right to restrict the use of land contiguous to it. In Cooley, Torts, p. 816, it is said: "Where the injury is inflicted upon the plaintiff upon his premises, it is not contributory negligence that he had not guarded his premises as perfectly against such injuries as prudence might dictate. Thus one's buildings near the line of a railway, by reason of very combustible material, may be peculiarly exposed to take fire from passing engines; but, while the owner must take upon himself all such risks as may result from a careful management of trains, he has a right to redress if his buildings are negligently burned." Several authorities are cited to sustain the text. In section 416, Beach, Contrib. Neg., a case is cited in which it was held that it was not contributory negligence to put up a wooden building upon a person's own property, although it be situated near a dock upon a navigable river, where the house is exposed to fire from steamers touching at the dock, and, if the house is burned by sparks from the steamer, the owner may recover damages, although he put the house there in the face of the risk. "The occupant of land near or even next to a railroad is not chargeable with contributory negligence merely by reason of leaving his land in its natural state, or making any legitimate use of his property. It makes no difference if by so doing his

property may be extremely liable to take fire in the event of the railroad trains being negligently managed. He is not required to anticipate such negligence, nor to give up the lawful use of his property in such manner as would be deemed prudent under ordinary circumstances, simply because a railroad has been constructed beside his land. * * * Neither will the knowledge of an adjacent landowner that engines on the road are habitually so mismanaged or defective as to cause frequent fires upon or near the track make any difference." Shear. & R. Neg., sec. 680. The above quotation is supported by the decisions of every State in the Union, with the exception, perhaps, of Iowa and Illinois, and is sound and just. No man in the lawful use of his property is chargeable with negligence because he does not anticipate the unlawful acts of others. It is not pretended in this case that appellant had been negligent in any manner, unless it was negligent to put his hay in a house that had been prepared for it upon his own land. The proposition contained in the charge was that, seeing the shucks which appellee had negligently allowed to accumulate on its right of way, he ought to have refrained from the use of his barn. The law does not require any such sacrifice at the hands of the landowner, and he is not required to anticipate negligence and unlawful acts on the part of another, and guard against the same by abandonment of the use of his property. Clark *v.* Dyer, 81 Tex. 339, 16 S. W. Rep. 1061.

The judgment is reversed, and the cause remanded.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS v. CHUMLEA.

Court of Civil Appeals, Texas, March, 1901.

MASTER AND SERVANT — RELEASE OF MASTER FROM LIABILITY FOR INJURY TO SERVANT — INSTRUCTION. — In an action to recover damages for personal injuries sustained while in the employ of defendant, where it appeared that plaintiff, after being injured, was promised work in the same capacity in defendant's service, this being one of the moving causes inducing plaintiff to execute a release, and plaintiff returned to such work, but afterwards, at instance of defendant, accepted employment in a different line of work, less remunerative, and retained the consideration paid by defendant, it was error to refuse defendant's request to give an instruction setting out the foregoing facts, and that if plaintiff voluntarily resigned from such service, he was without remedy as to any right of recovery against defendant, as such instruction correctly stated the law.

APPEAL from District Court, Hill County.

Action by A. H. Chumlea against the Missouri, Kansas and Texas Railway Company of Texas for injuries received while in the employ of defendant. From a judgment in favor of the plaintiff, defendant appeals. *Judgment reversed.*

T. S. MILLER and RAMSEY & ODELL, for appellant.

WEAR, MORROW & SMITHDEAL, for appellee.

KEY, J. — This is a personal injury suit resulting in a verdict and judgment for the plaintiff. The defendant has appealed, and we sustain the sixth assignment of error, complaining of the action of the court in refusing the following special instruction: "If in this case you find from the evidence that, as a consideration in part of the release read in evidence by the defendant, the plaintiff was promised work in the service of the defendant in the same capacity in which he had heretofore labored, and that this was one of the moving causes inducing plaintiff to execute said release, and that plaintiff did thereafter return to the employment of the defendant company in the same capacity in which he had before that time labored, but that thereafter, at the instance of the defendant, he accepted employment in a different line of work, less remunerative, with full knowledge of such fact, and of the nature and compensation of the work, and entered upon same retaining the consideration paid by defendant, this, in law, would constitute an election to engage in such different service; and if thereafter the plaintiff resigned from such service voluntarily, he will be without remedy as to any right of recovery against the defendant; and, if you so believe, you will find for the defendant." This charge stated the law correctly on a phase of the case presented by the evidence and not covered by the court's charge. We also think the evidence referred to in the first assignment of error should not have been excluded. The other questions of law presented in appellant's brief may not arise upon another trial. We make no ruling upon the merits of the case as disclosed by the testimony in the record.

Judgment reversed, and cause remanded.

WESTERN UNION TELEGRAPH COMPANY v. RICE.

Court of Civil Appeals, Texas, March, 1901.

FAILURE TO DELIVER DEATH MESSAGE—MENTAL ANGUISH—DAMAGES. — In an action to recover damages for failure of the telegraph company to deliver a telegram announcing the death of plaintiff's daughter, whereby plaintiff was prevented from attending the funeral of his daughter, a judgment in favor of plaintiff for $750 was sustained, where it was shown that if the telegram had been promptly delivered to the party to whom it was addressed, plaintiff could and would have been present at the funeral of his daughter (1).

APPEAL from District Court, Fannin County.

Action by John Rice against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. *Judgment affirmed.*

WILKINS, VINSON & BATSELL and GEO. H. FEARONS, for appellant.

J. C. MEADE and TAYLOR & MCGRADY, for appellee.

FISHER, Ch. J. — This suit was instituted in the District Court of Fannin county on November 2, 1899, by John Rice against the Western Union Telegraph Company, for damages in the sum of $1,000 for mental suffering claimed to have been sustained by him on account of the alleged negligence of the defendant company in transmitting and delivering a certain telegraphic message filed in the defendant's office at Klondike, Tex., on August 22, 1899, addressed to S. E Roberts, Bonham, Texas, reading, "Virgia is dead, send Mr. Rice word," signed "W. B. Adair," whereby plaintiff was prevented from attending the funeral of his daughter, who was the Virgia mentioned in the message. The defendant answered by general demurrer and general denial. The case was tried before a jury on February 28, 1900, and resulted in a verdict and judgment for plaintiff for $750. The facts in the record are substantially in accord with those pleaded by the plaintiff, and we find that the evidence is sufficient to support the judgment of the trial court, and

1. See notes of recent "Telegram Cases," at end of this case.

For other "Telegram Cases," from 1897 to date, see vols. 1-9 AM. NEG. REP., and the current numbers of that series of Reports.

See also Note on Liability of Telegraph Companies for Failure to Deliver, or Delay in Delivery of, Telegrams relating to Sickness and Death, and Recovery of Damages for Mental Suffering caused thereby, in 8 AM. NEG. REP. 578-585.

that the appellant was guilty of negligence in failing to promptly deliver the telegram, and that, if it had been promptly delivered to the party to whom it was addressed, the appellee could and would have been present at the funeral of his daughter.

We cannot agree with the appellant in its first assignment of error. The testimony there complained of was admissible.

If it could be conceded that the remarks of counsel complained of in the second and third assignments of error were improper, we do not think they were of such a reprehensible character as would require a reversal of the judgment.

In disposing of the fourth and fifth assignments of error, we take occasion to say that the evidence on the principal questions raised in the case, as well as the amount of the verdict, is sufficient to support the judgment. We find no error in the record, and the judgment is affirmed.

NOTES OF RECENT ACTIONS ARISING OUT OF FAILURE TO PROPERLY DELIVER TELEGRAPHIC MESSAGES.

Failure to promptly deliver death message -- Addressee's delay — Evidence — Instruction.

In WESTERN UNION TELEGRAPH CO. *v.* BRYSON (*Texas Civil Appeals, January, 1901*), 61 S. W. Rep. 548, action for damages for delay in transmission and delivery of a death message, the telegraph company appealed from judgment for plaintiff, assigning as error refusal to direct verdict for defendant, upon the ground that, to quote from one of the assignments (as per opinion by STEPHENS, J.), "the uncontradicted testimony showed that said message was transmitted to Chickasha, and delivered to Jack Ware, and to plaintiff himself, in time for plaintiff to have gone to Centralia and reached his brother before his burial, if the plaintiff had availed himself of the ordinary means of travel open to him;" the case being one in which appellee was given a verdict for being deprived of attending his brother's funeral in consequence of the failure of appellant to promptly deliver to Jack Ware, at Chickasha, Ind. T., a message sent from Centralia, Mo., to Gainesville, Tex., and forwarded to Chickasha, addressed to appellee in care of Jack Ware, announcing that appellee's brother was not expected to live. The message was received at Chickasha a little after seven o'clock P. M., August 29, 1899, but was not delivered to Jack Ware until a little after eight o'clock the next morning. Appellee, whose home was at Gainesville, but who had a ranch and was engaged in feeding cattle about ten miles from Chickasha, came to town that morning, and received

the message about eleven o'clock. By taking a train which left Chickasha that afternoon at 2:30, he could have gone to Centralia, Mo., in time for the funeral of his brother. We must, therefore, determine whether the excuse offered for not taking that train was such as to warrant the court in withdrawing the case from the jury, for it has been held in this State that such an issue is ordinarily one for the jury. Telegraph Co. *v.* Lydon, 82 Tex. 364, 18 S. W. Rep. 701; Telegraph Co. *v.* Terrell (Tex. Civ. App.) 30 S. W. Rep. 70; Telegraph Co. *v.* Elliott (Tex. Civ. App.) 27 S. W. Rep. 219. It is, however, insisted that in this instance the excuse was so clearly insufficient as to bring it within the rule applied in Telegraph Co. *v.* Birchfield (Tex. Civ. App.) 38 S. W. Rep. 635, and there is much force in the contention. Appellee testified "that on the morning of August 30, 1899, he went from his ranch to Chickasha, and arrived there about eleven o'clock that morning; that Mr. Ware told him about the message, and he went to the depot and saw a copy of it; that the message was sent to Chickasha in care of Jack Ware, who was the plaintiff's grocery man; that the depot was 75 or 100 yards from the store of Ware; that when he (plaintiff) received the message he sent a message to his nephew at Centralia that he would start on the first train; that he was in town that morning, and had come to get some medicine for his son, who was sick, and was in his shirt sleeves and overalls, and that he went back to the ranch to deliver the medicine and to change his clothes and give instructions about business; that his son was sick, and nobody was in charge of the ranch; that he had hands working on the ranch; that he did not know that his brother was sick, but that he knew that his general health was bad; that after receiving the message he went back to the ranch, and fixed up some matters hastily, and returned to Chickasha, and took the night train at two o'clock on the morning of August 31, 1899; that he went from Chickasha to Kansas City, and from there to Centralia, arriving there about ten o'clock P. M., August 31st; that when he got there his brother was dead; that he died at about four o'clock on the evening of August the 30th." He further testified, on cross-examination, "that it was prairie country between his ranch and Chickasha, and that they had a pretty good country road all the way during August, 1899; that at the time he was worth as much as ten thousand dollars, and could have bought a suit of clothes; that he had money on hand to answer his needs, and had credit; that his sick son was twenty-three years of age, and lived on his ranch, was married and keeping house, and was assisting plaintiff in managing his business at the ranch; that when he (the witness) was away his son would take charge;

that his son's wife was well, and that his son was not under the treatment of a doctor; that he had bilious fever, and had been to the doctor, and had been there for medicine; that his son had been sick for a couple of weeks, but was getting better, but was not up; that he had hands on his place; that he went back home after receiving the message to take some medicine to his son and change his clothes and give instructions as to his business; that he was able to buy a suit of clothes, and that he could have hired some one to take the medicine out to his son; that he could have sent word out to his men by the messenger, giving them instructions about managing his affairs until he could return, but that it would have been a bunglesome way to do it; that after he received the message he could have hired a team at a cost of about two dollars, and driven out to his ranch, and on the way thought of what instructions he wanted to leave; that he knew that a train left Chickasha on the evening of August 30, 1899, at 2:30, bound for Centralia; that after he received the message at eleven o'clock on the morning of August 30, 1899, he did not know whether his brother was dead or alive, and that he knew that it had been sent the evening before, and stated that his brother was not expected to live; that if he had gone on the 2:30 train on the evening of August 30, 1899, he would have arrived in Centralia about twelve noon the next day, August 31, 1899; that his brother was buried about five o'clock on the evening of August 31, 1899; that, had the message been delivered to Mr. Ware by eight o'clock of the 29th of August, he (plaintiff) could and would have arrived in Centralia the evening of the 30th, which would have been twenty-four hours earlier than he did arrive there, and about eighteen hours before his brother's funeral." It was admitted that if the message had been promptly delivered he could not have reached his brother before his death. He further testified that no reply was received from the message, "Wire me this evening this place; I start to-night," — which he sent to Centralia a little after eleven o'clock; that he waited nearly an hour for a reply before he started back to the ranch; "that he had cattle feeding at three different places, and that his son was not able to give them attention; that he could not have given instructions as to their management in writing satisfactory to himself." The issue was thus submitted in the charge: "Now, if you believe from the evidence that a reasonably diligent and prudent man, possessed of the same information that plaintiff had, and similarly situated and circumstanced as plaintiff was, as shown from all the evidence before you, would have started to his brother on the train that passed through Chickasha about 2:30 o'clock P. M. of that day, then the

plaintiff will be precluded from a recovery." Having set out the evidence constituting the basis of this charge, we need not discuss it further than to say that we cannot quite assent to the proposition that it showed conclusively that the conduct of appellee in waiting for the night train was wholly inexcusable; there being a combination of circumstances apparently constraining such postponement of his journey, and a moral impossibility being equivalent to a physical one in cases of this kind, and what a person of ordinary prudence and diligence would have done under like circumstances being peculiarly a question for the jury. If the evidence tended to show a reasonable excuse for the failure to take the first train, and we think it did, it was the duty of the court to submit the issue to the jury. We are not required by these assignments to consider the sufficiency of the evidence to sustain the finding that the excuse was reasonable, but only whether or not the issue was raised by the testimony. * * *" The court discussed other assignments but found no reversible error, and judgment for plaintiff was affirmed.

Non-delivery of death message — Mental anguish — Sickness — Remote damage — Rule as to damages.

In WESTERN UNION TELEGRAPH CO. *v.* RAGLAND (*Texas Civil Appeals, February, 1901*), 61 S. W. Rep. 422, action for non-delivery of death message, judgment for plaintiff was reversed on the question of damages. The opinion by JAMES, Ch. J., stated the facts as follows: "Appellee (plaintiff) sued for damages for mental anguish, loss of time, and physical suffering on account of the non-delivery of the following message: 'Winnsboro, Texas, Jan. 12, 1898. To Will Rone, Commerce, Texas: Send Jim Jackson word pa is dead, and have grave dug by my children. Leave space for one grave. Have two wagons meet train at Campbell at 11:50 this morning. John Ragland.' There was testimony of the following facts: The message, when it reached Commerce, read, 'Will Bone,' and therefore failed to be delivered. There was testimony which tends to show that the mistake in the name of the addressee was due to negligence of defendant's agents in transmitting it." On the question of damages for the injuries sustained the court said: "It was shown that, when plaintiff arrived at Commerce with the corpse, as consequences of the failure to properly transmit and deliver the message, he was not met by wagons, nor was the grave dug, and he was unable to inter the remains that day, and had to hold them until the next day. Plaintiff testified, in effect, that when he arrived at Campbell he waited awhile, thinking the wagons would come; that he sent a neighbor for wagons, and one came, and the corpse

was hauled out, and, traveling at the usual gait, arrived at his home about sundown. He lived about a half mile from the graveyard. No grave had been prepared, and the body remained at the house until next morning, when it was buried. It was decomposed before burial, and offensive. He was not expecting to keep the body overnight. He had to walk part of the way, and became fatigued, and took cold, and was sick on account thereof for about three weeks. Could do no work during that time. His time was worth one dollar per day. The failure of the wagons to meet him to transport the remains, and having to haul it out under the circumstances; the walk, and taking cold and getting sick, and having to keep the remains at his house overnight, and the body becoming decomposed and offensive before it could be buried, — all these things distressed and grieved him, and had a serious effect on him, and he suffered from his sickness about three weeks. The rule is that plaintiff may recover for such injuries as may fairly and reasonably be considered as arising, according to the usual course of things, from the breach, or as may reasonably be supposed to have been contemplated as the probable result thereof. Telegraph Co. *v.* Edmondson, 91 Tex. 209, 2 Am. Neg. Rep. 469, 807, 42 S. W. Rep. 549. The third assignment complains of a charge authorizing the jury to find "for plaintiff such additional sum (in addition to the cost of the message) as will compensate him for his loss of time, physical and mental pain, and anguish suffered, if such as may have been the proximate and direct result of defendant's failure to deliver such message." The complaint made is that such matters as loss of time and physical pain were too remote, and could not have been contemplated by the parties when the message was sent. We think appellant is right in this assignment. It could reasonably have been expected that the non-delivery of the telegram would cause plaintiff some delay, and the loss of time consequent on his inability to have the burial take place that day, but not that it would cause him exposure and consequent sickness. The only testimony of physical pain was the sickness which resulted from plaintiff taking a cold. There is no state of facts here which would warrant the jury taking into consideration such sickness, and the attendant suffering and loss of time, as damages that were, or might reasonably have been, anticipated. * * *" Judgment reversed.

Delay in delivery of telegram — Improper remarks of counsel — Mental suffering — Damages — Instruction.

In WESTERN UNION TELEGRAPH CO. *v.* BURGESS (*Texas Civil Appeals, February, 1901*), 60 S. W. Rep. 1023, action for negligence in delivering telegram, judgment for plaintiff for $500 was reversed,

among other grounds, for improper remarks of counsel on the trial, and refusal of trial court to instruct that plaintiff was not entitled to recover for mental suffering. On these points the court (*per* PLEASANTS, J.) said: "In his argument to the jury counsel for appellee told the jury that upon two former trials of this case a verdict had been rendered for the plaintiff upon the same testimony which was before them in this case. Counsel for appellant excepted to this statement as being unwarranted by the evidence in the case, and calculated to influence the jury to the prejudice of appellant. The record fails to show that the court sustained appellant's exception, or did anything at the time showing a disapproval of the action of appellee's counsel in making said statement to the jury, but in his charge to the jury the court tells them that they should disregard that portion of the argument of appellee's counsel which referred to the result of the former trials of this case. Counsel for appellee frankly admits that said argument was improper, but says that he was provoked to make the statement complained of by certain statements made by appellant's counsel in his address to the jury. The record does not disclose any remarks of appellant's counsel which would excuse or justify the statement of appellee's counsel as to the result of the former trials of this case. If the verdict of the jury in this case was not apparently against the preponderance of the evidence, we would hold that, in view of the instruction in the charge of the court that the jury should not consider said statement, it was not probable that any injury resulted to appellant from the improper remarks of counsel for appellee, but under the facts in this case we cannot so hold. The unauthorized statement was made for the purpose of influencing the jury, and it very probably did influence them, notwithstanding the admonition of the court to disregard it. This is no reflection upon the integrity or intelligence of the jury, for the human mind is often unconsciously controlled by influences which it has striven to combat, and which it believes it has overcome. In recognition of this fact, the law throws around a jury every safeguard to keep their minds free from every impression except such as is produced by the legal evidence admitted in the case, and a disregard of these safeguards in the trial of a case makes it the duty of an appellate court to set aside the verdict of the jury in all cases in which it is probable that such irregularity has been injurious to the party complaining of it. Railway Co. *v.* Washington (recently decided by this court), 58 S. W. Rep. 1042; Internat. & G. N. Ry. Co. *v.* Irvine, 64 Tex. 529, 6 Am. Neg. Cas. 531; Willis *v.* Lowry, 66 Tex. 542, 2 S. W. Rep. 449; Willis *v.* McNeill, 57 Tex. 475; Brown *v.* Swineford, 44 Wis. 282.

"The trial court further erred in refusing to instruct the jury, at appellant's request, that appellee was not entitled to recover anything for her mental suffering during the night of June 30th. The uncontradicted evidence shows that when the message was delivered by appellee to appellant's agent at New Orleans she was told that no answer could be obtained until the next morning, the appellee herself testifying to this fact. Having sent the message with the understanding that it could not be delivered at Beaumont until the morning of July 1st, she was clearly not entitled to recover for her suffering during the night of June 30th, because such suffering was not caused by the negligence of the appellant. The evidence in the case warranted the submission of the requested charge, and, in view of the omission of the court to properly instruct the jury upon this point in his main charge, said requested charge became not only pertinent, but necessary, in order that the jury should be fully informed as to the law of the case, and its refusal was reversible error. Telegraph Co. *v.* Andrews, 78 Tex. 307, 14 S. W. Rep. 641; Railway Co. *v.* McGlamory, 89 Tex. 637, 35 S. W. Rep. 1058. * * *" Judgment reversed.

See former appeals in the Burgess Case (*supra*), in 43 S. W. Rep. 1033; 46 Id. 794, and 56 Id. 237.

Failure to deliver sick message — Mental suffering — Damages — Law of place.

In THOMAS *v.* WESTERN UNION TELEGRAPH CO. (*Texas Civil Appeals, February, 1901*), 61 S. W. Rep. 501, failure to properly transmit and deliver a sick message, judgment for defendant was affirmed. "The action was brought in the District Court of Camp county, Texas, alleging negligence in failing to properly transmit and deliver a message dated August 11, 1899, delivered to defendant's agent at its office in Texarkana, in Arkansas, addressed to plaintiff at Hatfield, Arkansas, as follows: 'Hattie is very low. Come at once. C. C. Buckner.' The petition alleged that the sum of twenty-five cents was paid defendant for said message, and alleged mental distress resulting to him from said negligence, laying the damages therefor at $2,000. The case went off on a plea in abatement to the jurisdiction of the court upon the ground that damages for mental anguish in such cases cannot be recovered under the laws of Arkansas, and that a demand for the sum of twenty-five cents was not within the jurisdiction of the court to try and determine. The court sustained the plea, and rendered judgment for defendant thereon. The evidence taken shows these facts: That at the time of this transaction Thomas resided in Texas, and had

left home, and was in Hatfield, Arkansas. When he left home he knew that his daughter, Hattie, the wife of C. C. Buckner, was sick at Ft. Lynn, Arkansas. The message was delayed in transmission and delivery, and he thereby lost the opportunity to reach his daughter before her death. It was in testimony that C. C. Buckner had telephoned from Ft. Lynn, Ark., to W. R. Lambeth, at Texarkana, Ark., who, from his store in Texarkana, Ark., telephoned to defendant's office in Texarkana, Ark. That defendant's agent declined to take the message by telephone, and requested him to come to the office, which he did, and the message was received and paid for. No conversation of any kind relative to the message was had. After the message was delivered to Thomas at 6:15 P. M., August 12th, he sat up all night, and took the 5:40 passenger train on August 13th, reached Texarkana about 10:40 A. M., and telephoned from Texarkana, Ark., to Ft. Lynn, and ascertained that his daughter had died, and was then being buried. That he suffered great disappointment and distress. It was shown that Texarkana has a population of about 20,000; that the State line about equally divides the city; that defendant had no office on the Texas side, but had its office on the Arkansas side; and that these conditions remain the same. It was proved that damages for mental distress alone are not a subject of recovery in Arkansas; that defendant company was chartered under the laws of New York, and had its domicile and principal office in New York City, where its president resides; that it was not chartered under the laws of Texas or Arkansas; that its wires connect and traverse all the States of the Union, and that it does business in Texas and elsewhere. After experiencing disappointment and grief over this matter in Arkansas, plaintiff came back to Texas, and continued so to suffer." The court (*per* JAMES, Ch. J.), after stating the facts, stated the points as follows: "The contentions of appellant are: 1. That defendant is liable to be sued by appellant, and according to the rules governing in Texas, because at the time of his injuries and when this suit was brought he was and is a citizen of Texas, and defendant was and is a corporation doing business in Camp county, Tex., and had and has an agent in Pittsburg, Camp county, Tex.; 2, that defendant is liable because the courts of Texas will not deny a citizen a right given him by the laws of Texas when the office of the defendant where the citizen lives is situated in the same city, but just across the State line, in Arkansas, when he is compelled to go into said office to send the message; 3, that the suit is for damages arising from a breach of contract sounding in tort, and in such a case the laws of Texas will govern in the matter of damages; 4, that the mental

anguish and disappointment were suffered in Texas, and therefore the redress should be made under the laws of Texas, although the wrong that caused them was committed in Arkansas; and, 5, that this was a transitory action, and was cognizable by the courts of Texas, regardless of whether the cause of action is *ex contractu* or *ex delicto*. All the facts connected with this transaction occurred in Arkansas, and the facts that are claimed to have the effect of making the case one determinable by the laws in force in Texas are that plaintiff was a citizen of Texas, and was only temporarily in Arkansas; that plaintiff, after learning of the death of his daughter in Arkansas, returned into Texas, and his grief continued there; and the fact that defendant, under the circumstances, maintained its office for Texarkana and that neighborhood on the Arkansas side, and Texas citizens were compelled to go there to send messages. We are of opinion that, so long as the laws of this State do not require, under such conditions as exist at Texarkana, that defendant must have an office within this State, defendant had a perfect right to have and maintain the office on the Arkansas side; and, until we have legislation on the subject, there is no ground for saying that this interferes with any public policy of this State. The mere fact that plaintiff was and is a citizen of Texas cannot be given the effect of drawing to the courts of this State the power to give redress for a matter which was not actionable or remediable in the foreign jurisdiction where it took place. * * *" Citing numerous cases. "The transaction in question took place wholly in Arkansas, and in accordance with the views above expressed, the amount of recovery, or the subjects in reference to which damages are to be allowed, will be governed by the law of that State. The testimony shows that damages for mental suffering alone cannot be recovered there. * * * We further conclude that the fact that Thomas, after the failure to deliver the telegram in time to enable him to go immediately to his daughter, and after receiving the news of her death, all of which took place in Arkansas, where his disappointment and distress begun, came into Texas, and continued there to suffer disappointment and distress, does not alter the case. The judgment is affirmed."

Failure to deliver telegram — Damages — Burden of proof.

In CLARKE v. WESTERN UNION TELEGRAPH CO. (*Georgia, January, 1901*), 37 S. E. Rep. 870, it was held that in an action against a telegraph company for a failure to deliver a telegram in due time it is incumbent on the plaintiff to prove affirmatively that damage resulted from the failure to deliver.

WILD v. UNION PACIFIC RAILROAD COMPANY.

Supreme Court, Utah, February, 1901.

BOY INJURED ON RAILROAD TRACK — PRACTICE — NONSUIT — APPEAL — BILL OF EXCEPTIONS — WITNESS — CREDIBILITY — EXCEPTIONS. — 1. A motion for nonsuit which is indefinite in its specifications cannot be considered.

2. Where a motion for a nonsuit is overruled, and thereafter plaintiff is allowed to introduce further testimony, and witnesses are examined and cross-examined at length, and the motion for nonsuit is not thereafter renewed, the question of the overruling of the motion for nonsuit cannot be reviewed on appeal.

3. Where a bill of exceptions does not comply with section 3284, Rev. St. 1898, and the abstract does not comply with rule 6 of this court, the court may affirm the judgment without regard to the bill of exceptions, and will hereafter do so, unless some fatal error not required to be shown by the bill of exceptions appears on the face of the record.

4. In actions at law the jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence; and under sec. 9, art. 8, Const., in cases at law the appellate court can only examine the evidence so far as may be necessary to determine the questions of law, and has nothing to do with the sufficiency of the evidence to justify the findings or judgment, unless there is no proof to support it.

5. General exceptions to instructions, each of which contains independent propositions, some of which are correct, cannot be considered.

BARTCH, J., dissenting.

(Syllabus by the Court.)

APPEAL from District Court, Second District.

Action by Francis Wild, by Matthew Wild, his guardian, against the Union Pacific Railroad Company. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

LE GRAND YOUNG and A. W. AGEE, for appellant.

H. R. MACMILLAN, for respondent.

BASKIN, J. — Francis Wild, an infant of the age of twelve years, by Matthew Wild, his guardian, instituted this suit to recover damages alleged to have been received by him through the negligence of the defendant. The answer denied the alleged negligence, and alleged that the injury complained of was caused by the negligence of the said Francis Wild and his wilful misconduct while wrongfully trespassing on the grounds and track of the defendant. The jury returned a verdict in favor of the plaintiff for $4,000, but the trial court overruled the defendant's motion for a new trial on condition that the plaintiff remit from the amount of said verdict all over the

sum of $2,500, which was accordingly done, and a judgment for the latter amount was rendered in favor of plaintiff, with costs. From this final judgment the defendant has taken this appeal.

After the plaintiff rested, the defendant made a motion for a nonsuit on the following grounds: "1. That the evidence adduced by plaintiff does not sustain the allegations of the complaint, nor any of them; 2, that the evidence does not show any negligence on the part of the defendant either in the construction or maintenance of the crossing; and, 3, it fails to show that the accident complained of was caused by the negligence, misconduct, omissions, or commissions of the defendant." After the motion was overruled the plaintiff was allowed to recall the witness Naylor, who was re-examined and recross-examined at great length; and counsel for defendant recalled Mrs. Wild, one of plaintiff's witnesses, and recross-examined her. After this additional testimony had been received, the motion for a nonsuit was not renewed. We cannot consider said motion: 1. Because it was too indefinite. White *v.* Railway Co. (Utah) 61 Pac. Rep. 568; Lewis *v.* Mining Co. (Utah) 61 Pac. Rep. 860; McIntyre *v.* Mining Co., 20 Utah, 323, 60 Pac. Rep. 552; Frank *v.* Mining Co., 19 Utah, 35, 56 Pac. Rep. 419. 2. Because the motion was not renewed after said additional testimony was given. Upon the close of the testimony the defendant requested the court to instruct the jury to return a verdict for the defendant, and one of the grounds of the motion for a new trial was the insufficiency of the evidence to justify the verdict. The bill of exceptions contains 608 pages of typewritten matter, and consists of the reporter's notes, the questions asked the witnesses and their answers, the side-bar conversations, and the remarks of the judge and counsel which occurred during the trial. In what purports to be the abstract, consisting of 171 pages, the bill of exceptions is presented in full. Such a bill does not conform to the requirements of section 3284, Rev. St. 1898. People *v.* Getty, 49 Cal. 581; Caldwell *v.* Parks, 50 Cal. 502. And what purports to be an abstract is not such as rule 6 (27 Pac. Rep. vii.) of this court requires. Under the precedent of Caldwell *v.* Parks, *supra*, we would be justified in affirming the judgment without regard to the bill of exceptions, and will do so in all cases hereafter appealed, unless some fatal error which is not required to be shown by the bill of exceptions appears upon the face of the record. In actions at law the jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence. Haun *v.* Railway Co. (Utah) 62 Pac. Rep. 908. And as said by Justice Bartch in Whittaker *v.* Ferguson, 16 Utah, 240, 51 Pac. Rep. 980: "We can, therefore, in cases at law, under section

nine of article eight of the constitution, examine the evidence only so far as may be necessary to determine the questions of law, and have nothing to do with the sufficiency of the evidence to justify the findings or judgment unless there is no proof to support it." Anderson *v.* Mining Co., 15 Utah, 22, 49 Pac. Rep. 126; Nelson *v.* Railway Co., 15 Utah, 325, 49 Pac. Rep. 644; Mangum *v.* Mining Co., 15 Utah, 534, 50 Pac. Rep. 834; Linden *v.* Mining Co., 20 Utah, 134, 148, 58 Pac. Rep. 355. The evidence introduced by the plaintiff tended to sustain his case, and the issues between the parties were therefore properly submitted to the jury; and their verdict, under the rule formerly established by the foregoing decisions, cannot be disturbed on the ground of the insufficiency of the evidence.

A general exception was taken to the second instruction, as also to the seventh. Each of these instructions contains independent propositions, some of which are undoubtedly correct. Such general exceptions, as has been frequently decided by this court, cannot be considered. Pool *v.* Railway Co., 20 Utah, 210, 58 Pac. Rep. 326; Scott *v.* Milling Co., 18 Utah, 486, 56 Pac. Rep. 305; Wilson *v.* Mining Co., 16 Utah, 393, 52 Pac. Rep. 626; Ganaway *v.* Associaion, 17 Utah, 41, 53 Pac. Rep. 830.

The defendant introduced evidence showing that the plaintiff, on the morning of the day that the accident occurred, but some time previous thereto, had been climbing and riding upon the cars of defendant. The fifth instruction to which objection is made is as follows: "If you find from the evidence that the plaintiff was climbing the cars on the morning in question, but find that at the time he was injured he was not riding upon or climbing said cars, or attempting to do so, but was injured in the manner as testified to by plaintiff, — by getting his foot caught in said crossing, — then I charge you that the fact that plaintiff was riding upon or climbing said cars, or attempting to so do, before the accident occurred, does not affect his right to recover." This instruction was properly given.

The foregoing objections are the principal ones presented by the brief of appellant's counsel. The others are not of such importance as to require special notice and are untenable. It is ordered that the judgment of the court below be affirmed at the costs of the appellant.

MINER, Ch. J. — After an examination, I find no error in the record of sufficient importance to justify a reversal of the case. I concur in the order affirming the judgment.

BARTCH, J., dissenting.

EWELL v. JOE BOWERS MINING COMPANY.

Supreme Court, Utah, January, 1901.

EMPLOYEE INJURED IN MINE — NEGLIGENCE — PROOF—CONFLICTING EVIDENCE — INSTRUCTIONS. — 1. Negligence cannot be presumed, nor the question thereof left to conjecture. It must be established bv testimony, and may be inferred from it; but it is not necessary for plaintiff to establish negligence by direct and positive testimony, or by eyewitnesses to the transaction. If the testimony establishes facts or circumstances from which negligence may properly and reasonably be inferred, it is sufficient (1).

1. *Employee injured in mine — Fall of rock.* — In FREEMAN *v.* SAND COULEE COAL CO. *(Montana, April, 1901)*, 64 Pac. Rep. 347, accident in mine, judgment for defendant was reversed. MILBURN, J., in the course of his opinion, said: " In this cause plaintiff appeals from an order overruling his motion for a new trial, the jury having found a verdict for the defendant. The action was for damages for injuries resulting to plaintiff from the falling of material from the roof of a coal mine belonging to defendant, in which plaintiff was, on December 31, 1895. employed as a loader of cars. The complaint sets out that in performing his work as such loader it was necessary to enter one of the main entries or tunnels from which the butt entry in which plaintiff was then working opened, and to move cars from such main entry into this butt entry to be loaded, by plaintiff; ' that the defendant did then and there, and long prior thereto, neglect its said duty towards this plaintiff, and did then and there expose the said plaintiff to unnecessary hazard and peril, which it might and ought in the exercise of reasonable care have guarded against, in this: that the defendant, then well knowing, or by the exercise of reasonable care could or might have known, the roof of said main entry where said cars were then standing as aforesaid, to be unsafe, and liable to fall or cave in, did wholly fail to keep safe or reasonably safe the place where said plaintiff was at work and in the discharge of his duties, and did fail and neglect to properly or at all brace or prop up the roof of the said main entry, tunnel, or hallway wherein it was the duty of said plaintiff to be to remove said cars in the discharge of his duties as such servant, but said defendant did suffer the said roof of said main entry, tunnel, or hallway then and there where said plaintiff was required to be in the discharge of his duties, and where said cars were then standing as aforesaid, to be and remain in an unsafe condition, and liable to fall or cave in, all of which was unknown to plaintiff, and all of which was known to the defendant, or by the exercise of reasonable care could have been known by said defendant;' 'that the said defendant so negligently conducted itself that through and by reason of its negligence and want of care, or the exercise of reasonable care, on its part aforesaid, in failing to keep the said place safe, or to brace up or prop the said roof, while said plaintiff was in the said employ of said defendant, and in the exercise of proper care in the discharge of his duties in loading and removing said cars from the said main entry, tunnel, or hallway, the said roof

2. Where the question of negligence is the essential fact in the case, and is denied, and the evidence is conflicting, or consists of circumstances from which fair and reasonable inferences may be drawn for or against it, it is within the province of the jury to determine, under proper instructions from the court, whether or not the evidence establishes it as the proximate cause of the injury complained of.
3. The questions of negligence of appellant and contributory negligence of respondent having been properly submitted to the jury, their finding thereon is conclusive on appeal.

(Syllabus by the Court.)

APPEAL from District Court, Fifth District.

of said main entry, tunnel, or hallway, composed of rock, earth, and other deposits, then and there loose and liable to cave in (unless the same was propped or braced as aforesaid), did then and there cave in and fall upon this plaintiff, crushing, wounding, bruising, and injuring him about the face, head, body, and crushing, mangling, and breaking his right leg near the ankle, and injuring and bruising said ankle, whereby he was made sick, sore, disabled, and forever lame, and whereby the use of his said right leg, ankle, and foot was partially destroyed, so that he has from that day to this been, and will forever remain, lame, and disabled from doing manual or other labor as a miner or otherwise — all to his damage in the sum of five thousand dollars.' The defendant admits its incorporation and business, and that at the time of the injury the plaintiff was in the employ of the defendant as a loader of cars; that he was injured by the fall of material from the roof of the mine, and that one of the bones in his right leg was thereby broken. It denies all other allegations of the complaint. The defendant alleges that at the time of the injury the plaintiff was not engaged in the discharge of his duties, but was in a portion of the mine where, at such time, he had no right to be, and that he received his injuries by reason of his negligence." After reviewing the testimony and setting out the instructions assigned as error by plaintiff, the court held that it was error for the trial court to confine the jury to consideration of the single question whether 'the condition of the roof was such that it was likely to fall of its own weight unless braced so as to support it.' It was for the jury to determine whether the defendant might, from knowledge of the condition of the roof, have reasonably anticipated, or with the exercise of reasonable care and prudence might have known, that the roof was in such a condition as to give it reasonable grounds for anticipating the very consequences which did happen concurrently with the attempt to place the plugs." Judgment reversed.

Employee injured in mine shaft — Proximate cause. — In ROE ET AL. *v.* THOMASON ET AL. *(Texas Civil Appeals, January, 1901)*, 61 S. W. Rep. 528, employee fatally injured while loading cage at bottom of mine, judgment for plaintiffs was reversed, the proximate cause of the accident being due to the sudden hoisting of the cage on which the injured employee was engaged in adjusting cars, which untimely hoisting of the cage was not due to defendant's negligence, and plaintiffs could not recover on the ground that the space around the bottom of the mine shaft was out of repair.

For other Mining Accidents, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

Action by Lorenzo Ewell against the Joe Bowers Mining Company. From judgment for plaintiff, defendant appeals. *Judgment affirmed.*

POWERS, STRAUP & LIPPMAN and D. D. HOUTZ, for appellant.

RAWLINS, THURMAN, HURD & WEDGWOOD, and BENNETT, HARKNESS, HOWAT, SUTHERLAND & VAN COTT, for respondent.

PER CURIAM. — The plaintiff, Ewell, brought this action to recover damages for an injury received by him while employed in the defendant's mine in the month of May, 1899. Plaintiff's evidence tends to show that at the time of the accident he was working on the 270 foot level; that a drift had been run south on the vein about sixty feet, and above this the ore had been stoped from the shaft, and the drift was timbered over and filled in from above, but there were left two openings from the level upwards into the stope. One of these openings was near the shaft, and the other about forty-five feet further in. This latter opening was about five feet square just above the drift, and as it continues upwards about fifteen feet it widens to about six feet, and about fifteen feet lengthwise with the drift. The filling slants down to the small opening immediately above the drift. This aperture opens above the drift into the stope, and is called the "hole," to designate it from the stope, where the waste had not been filled in. No planks or means were provided for covering up the hole. The planks and covers formerly used for covering it had been taken away about a month or more by order of the foreman. Below this hole a platform had been laid on the floor of the drift to catch the ore shoveled down the "hole" from above, so it could be sorted. There was lagging on one side of the hole to the top about thirty feet; on the other side it was lagged for about ten feet. Above the lagging the hole spread out about fifteen feet from the lagging back to the wall. In this fifteen feet there was nothing but stulls to hold the walls apart. At this point the hanging walls were, as witnesses expressed it, "blocky" and "scarry," and would drop off, and come down to the bottom of the level, where there was a platform for sorting it. The hanging walls were of porphyry, and, on exposure to the air for a time, would drop off, unless properly timbered. The stulls that had been put in would not hold the ground after it had been exposed to the air three or four weeks. The foreman informed the superintendent of the mine before the accident that the stulls were not sufficient to hold the ground, and asked him if he would put in a chute; that the walls were unsafe, and that it was caving around the stulls. The superintendent replied, in substance, that he did not think it necessary to put in a chute; that he should put in more stulls. It also

appears that, in order to hold the ground, and make it safe, it was necessary to put in square sets or chutes, and fill in around the chutes. There was no lagging on the hanging walls, and the rock had "slabbed" off and fallen down in places. If anything fell off from the hanging walls, it would go down to the bottom of the 270-foot level on the platform for sorting ores. On the day of the accident plaintiff (the respondent) was working in the stope about fifteen feet from the opening. On this side the hole had been lagged up, and the filling stoped upward towards the place where he was working. At 11:30 A. M. plaintiff "put off a shot" about fifteen feet north from the hole. Part of the ore broke loose, and rolled down on the platform below, and the balance was shoveled down by the respondent. Respondent says that he shoveled the waste and everything of that kind down the hole before he commenced sorting the ore after dinner. The testimony on this subject, however, is contradictory. After this, respondent states, he went to dinner on the 270-foot level. After dinner the shift boss directed respondent to sort the ore that had been thrown down and which lay on the platform under the hole. While so employed, stooping over the pile of ore on the platform, a rock fell from above, and struck him upon the head, inflicting a serious injury. The shift boss saw the rock strike the respondent on the head, and he immediately pulled him from under the hole. He says that right away after the respondent was struck there was some ore came down; "that he was afraid he would get the contents of the rest of it, and he pulled him out as quickly as possible;" that he saw hanging wall material and porphory on the platform immediately after the respondent was struck; also some ore. He says, also, that it was the same-looking stuff and material as the hanging walls from the hole above. Upon this statement of facts the appellant contends that the evidence is insufficient to sustain the verdict, or to show negligence on the part of the appellant. It is true that no witness gave testimony that he saw the place where the rock that struck respondent came from. Nor does any witness testify that he saw it come from the hanging wall of the hole in question. But the evidence tends to establish the fact that the rock fell, and hit the respondent on the head. This rock was like the material on the hanging wall above, which was loose, and which had fallen at several intervals of time prior to this time, so that the wall was considered dangerous, and it was necessary that it should be stulled, or to have square sets of timber placed therein to make it safe. This timbering was not done, although the attention of the superintendent was called to the unsafe condition of the walls prior to the accident. There was no

covering provided for the hole above to prevent the ore or rock from falling below. It also appears that, if the rock and porphyry lining the sides of the hanging wall fell, it would fall to the platform at the bottom of the hole, where the foreman directed the respondent to work. The hanging walls were of such a character as to be affected by contact with the air, and thereby rendered unsafe, unless they were properly timbered.

It is true that negligence cannot be presumed, nor the question thereof left to conjecture. It must be established by testimony, and may be inferred from it. But it was not necessary for the respondent to establish negligence by direct and positive testimony, or by eyewitnesses to the transaction. If the testimony establishes facts or circumstances from which negligence may properly and reasonably be inferred, it is sufficient. Where the question of negligence is the essential fact in the case, and is denied, and the evidence is conflicting, or consists of circumstances from which fair and reasonable inferences may be drawn for or against it, it is within the province of the jury to determine, under proper instructions from the court, whether or not the evidence establishes it as the proximate cause of the injury complained of. Wilson *v.* Railroad Co., 62 Cal. 172. The appellant alleges in its answer that the respondent was guilty of contributory negligence. On this issue it was incumbent upon the respondent to prove by facts and circumstances, or both, that the appellant had, by some negligent act or omission, violated some duty imposed upon it by reason of which the injury was inflicted. The appellant could show under its pleadings that the respondent was guilty of some contributory negligence or want of care which caused or was the proximate cause of the injury. The question of the negligence of the appellant and the contributory negligence of the respondent and all the facts in the case were properly submitted to the jury, and they found the issues in favor of the respondent. This finding on the testimony in the case is conclusive on appeal, and cannot be disturbed by this court. This has been the uniform ruling of this court.

The appellant also assigns error in the refusal of the court to instruct the jury as requested, and in the charge of the court. We have carefully examined the court's instructions to the jury, and find no reversible error therein. Such of the appellant's requests as were proper were covered by the charge of the court. Several errors are also assigned upon the admission and rejection of testimony. We find no reversible error under such assignment. Upon the whole record, we find no reversible error.

The judgment of the District Court is affirmed, with costs.

MEYER'S SONS v. FALK.

Supreme Court of Appeals, Virginia, March, 1901.

SALESWOMAN INJURED WHILE STEPPING OUT OF ELEVATOR IN STORE — DEFECT — KNOWLEDGE OF MASTER — EVIDENCE. — In an action to recover damages for injuries received by plaintiff when stepping out of an elevator in defendant's store, where she was employed as a saleswoman, evidence that the elevator had been in use six months, that it had been defective continuously from the beginning of its use to the date of the accident, and that the elevator boy, during the time of his service, was continuously incompetent, was relevant and proper to establish defendant's knowledge of these facts (1).

1. *Employee injured in elevator — Defective doors — Evidence — Ordinance.* — In H. CHANNON COMPANY *v.* HAHN *(Illinois, February, 1901)*, 59 N. E. Rep. 522, elevator accident case, judgment for plaintiff was affirmed. "It appeared that he [plaintiff] was thirty years old at the time of the trial, but only twenty-three at the time of the injury; that he had been in the employ of the appellant but three days, including the day on which he was injured; that his work, in the main, was in the basement or lower stories of the building; that the evidence tended to show he had ridden in the elevator but one time; that the two doors of the elevator shaft in the different floors were provided with spring hinges for the purpose of swinging the doors shut; that these doors opened out into the rooms, and were two in number at each opening; that the lower hinge on one of the doors of the shaft on the fifth floor had been broken or unscrewed from the door for probably three weeks before the appellee was injured, or for practically the same length of time before he was employed by the appellant; that on the day in question this door, which was hanging by the upper hinge only, had been opened back, and some rope or other like material had been piled up against it to hold it and support it, thus leaving it standing open; that the appellant had actual knowledge of the defective and broken condition of this door for at least two weeks before the occasion in question; that the time of the injury was about five o'clock in the evening or afternoon of December 2d; that artificial light was required, and that the gas jets had been lighted in the room, but there was no jet at the elevator opening, or near enough to light up the opening; that appellee, under the orders of a vice principal of the appellant company, together with others of appellant's workmen, was engaged in straightening or spreading out wet and frozen canvas or sail covers on the floor of the fifth story; that in doing said work it was necessary the workmen should walk backward; that they had just brought the bundle of wet and frozen canvas up in the elevator, and taken it out into the room to be spread out on the floor; that said vice principal, Kelly, had, without the knowledge of the appellee, sent the elevator down the shaft; and that the appellee testified he did not know the hinge of the door was out of order, or the door propped back so it would not close. We think, upon the whole facts, the court correctly decided that

ERROR to Law and Equity Court of City of Richmond.

Action by one Falk against Meyer's Sons for personal injuries. There was judgment in plaintiff's favor, and defendants bring error. *Judgment affirmed.*

P. H. C. CABELL and L. O. WENDENBURG, for plaintiffs in error.

MEREDITH & COCKE, for defendant in error.

HARRISON, J. — This action was brought to recover damages for an injury alleged to have been received by the plaintiff when stepping out of an elevator in the store of the defendants, where she was employed as a saleswoman.

It appears that the plaintiff had been in one of the upper stories of the establishment, and, after making a sale, was returning, with the customer, on the elevator, to the lower floor; that when she attempted to leave the elevator she made a false step, in consequence of the elevator being six or eight inches above the level of the floor,

the testimony sufficiently tended to support the allegations of the declaration that the appellee had exercised due care to warrant the submission of that issue to the jury." * * * "In behalf of the appellee the following ordinance, adopted and in force in the city of Chicago, was read in evidence: 'Sec. 1136. It shall be the duty of every person owning, controlling, operating or using, as owner, lessee or agent, any passenger or freight elevator in any building within the corporate limits, to employ some competent person to take charge of and operate the same, and any such person who shall neglect to comply with the provisions of this section shall be fined the sum of $10 for each and every day of such neglect." It appeared from the evidence that the appellant company did not have any person, competent or otherwise, employed and charged with the duty of taking charge of and operating the elevator, as required by the ordinance. The elevator was for the purpose of hoisting freight, but the employees of the company were expected to and did use it in going to and from the different floors. It appeared that different employees of the company were in the habit of running the elevator when they found it necessary, in the discharge of the work in which they were engaged, to take freight from one floor to another. If one of such workmen desired to use the elevator if it was standing on the floor on which he was engaged he simply entered it, and put it in motion. If it was on another floor he would ring for it, and some one on that floor would start the elevator up or down, as the case might be, without any one being on it, and the workman who rang for it was expected to catch it and stop it at the floor where he was engaged. The breach of this ordinance was alleged in different counts of the declaration, was clearly established by the proof, and this constituted a *prima facie* case of negligence, if the violation of the municipal law caused or contributed to the personal injury received by the appellee." * * * It was held that request to direct verdict for defendant was properly refused. Judgment of Appellate Court (90 Ill. App. 256) affirmed. Opinion by BOGGS, Ch. J.

For other "Elevator Accident cases," from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

See note on Elevator Accidents, in 8 AM. NEG. REP. 146–157.

and injured her knee, resulting in the loss of her leg, which had to be amputated.

Two grounds of liability are alleged:

First. That the defendants negligently failed to exercise reasonable and ordinary care in the selection of a competent person to manage and operate the elevator, and that by reason of the negligent and careless management of such person the plaintiff was injured.

Second. That the defendants carelessly and negligently allowed the elevator to be in such improper and unsafe condition and repair as to cause or permit the same improperly, and against the intent, purpose, and management of the person in charge, to suddenly rise or jump up several inches after the same had been brought to a proper standstill on a level with the floor; and that the injury complained of was the result of this defective action of the elevator as the plaintiff was about to leave it. The trial in the lower court resulted in a verdict and judgment in favor of the plaintiff, which we are asked to review and reverse.

The action of the court in permitting a paper writing purporting to be the deposition of George Jefferson to be read to the jury in behalf of the plaintiff is assigned as error.

It appears that the counsel of either party had, by tacit understanding, access to the deposition in the hands of the notary, and the privilege, which both exercised, of removing it at pleasure for the purpose of reading it; that on the day of the trial, and before the jury were sworn, the plaintiff's counsel brought the deposition into court, and moved that it be filed. In response to the court's inquiry whether there was any objection to the deposition being filed, counsel for the defendant replied that they declined to say whether they objected to the filing or not. Thereupon the court ordered the deposition to be filed. In the progress of the trial, after the plaintiff had introduced several witnesses, she offered to read the deposition in question. The defendants objected upon the ground that the deposition had not been signed, certified, and transmitted to the clerk by the notary, as required by statute.

This objection is without merit. It was the duty of the defendant's counsel, when called upon, before the trial began, to state any objection they had to the filing of the deposition, in order that the plaintiff might have the opportunity to cure the irregularities complained of. Having failed to speak when they should have done so, they are now estopped to make the objection relied on.

A number of exceptions were taken to the action of the court in refusing to sustain the defendant's objection to certain questions

and answers in the deposition of George Jefferson and other witnesses whose testimony was given on the trial.

The elevator had not been in use more than six months, and the purpose of the testimony objected to was to show that it had been defective continuously from the beginning to the date of the accident, and to show that the elevator boy was, continually during the time of his service, incompetent, and thereby to establish the defendant's knowledge of these facts.

Knowledge of the incompetency of the elevator boy could have been brought home to the defendants by showing either that they saw his acts of negligence, or that such acts of negligence occurred so frequently that the law would presume knowledge thereof. So knowledge of the defective condition of the elevator could be shown by proving actual knowledge on the part of the defendants, or by showing that it had been out of condition for such a length of time that the law would presume knowledge on their part. For the purpose of showing that the defendants knew, or by the exercise of ordinary care ought to have known, of the negligence alleged, the evidence in question was relevant and proper. 1 Shear. & R. Neg. (5th ed.) secs. 192, 203a; Bailey *v.* Railroad Co., 139 N. Y. 302, 34 N. E. Rep. 918; Hilts *v.* Railway Co., 55 Mich. 437, 21 N. E. Rep. 878; Railway Co. *v.* Blake, 173 Ill. 354, 50 N. E. Rep. 1070; District of Columbia *v.* Arms, 107 U. S. 519, 2 Sup. Ct. Rep. 840.

If the defendants had desired to have the consideration of this evidence limited to the particular purpose for which it was introduced, they should have asked the court to instruct the jury accordingly. The court having admitted the evidence generally, and the objection being general, this court will not interfere with that action, if it appear that the evidence was admissible for any purpose.

In Taylor on Evidence the rule is stated thus: "When evidence is offered for a particular purpose, and an objection is taken to its admissibility for that purpose, if the judge pronounce in favor of its general admissibility in the cause, the court will support his decision, provided the evidence be admissible for any purpose. The opposing counsel should in such a case call upon the judge to explain to the jury that the evidence, though generally admissible in the cause, furnishes no proof of the particular fact in question; and then, should the judge refuse to make the explanation required, an application might be made to the court above for a new trial on the ground of misdirection." 3 Tayl. Ev., sec. 1881b; 1 Greenl. Ev. (14th ed.) p. 680, note; Cluverius' Case, 81 Va. 787; District of Columbia *v.* Arms, 107 U. S. 519, 2 Sup. Ct. Rep. 840.

Objection is made to the instructions given by the court, and

exception taken to the refusal to give certain instructions asked for by the defendants. It is not necessary to comment in detail upon the eleven instructions given by the court. Taken as a whole, they fully state the law, and fairly submit the case to the jury. All that was proper in the instructions refused was embraced in the instructions given, and to have added repeated statements of the law in somewhat different form would have only tended to confuse and mislead the jury. It does not appear that the defendants have been in any way prejudiced by the court's action in giving to the jury the law applicable to the case.

The only remaining assignment of error is to the refusal of the court to set aside the verdict as contrary to the law and the evidence.

The evidence was conflicting, two theories being propounded; the one that the defendants were guilty of negligence, and the other that the plaintiff was guilty of contributory negligence. As already stated, the jury were properly instructed as to the law applicable to each theory, and they have accepted the view favorable to the plaintiff, and this conclusion has been approved by the learned judge who presided at the trial. Under these conditions, upon well-settled principles, this court will not disturb the verdict.

For these reasons the judgment must be affirmed.

TAYLOR v. CITY OF BALLARD.

Supreme Court, Washington, March, 1901.

DEFECTIVE HIGHWAY — UNGUARDED ELEVATED ROAD — HORSE FRIGHTENED BY ESCAPE OF STEAM FROM CITY WORKS — VEHICLE UPSET — EVIDENCE. — In an action to recover damages for injuries sustained while driving on an elevated road in a city, it appeared that the accident occurred opposite the city's waterworks and electric light plant, which were constructed by and are operated by the city at a place where the road was not guarded, the road being elevated from three and one-half to six feet. While plaintiff was driving on this road on a dark night, his horse shied at the steam which escaped from defendant's works, and backed the vehicle over the side of the road, and plaintiff was injured by being thrown among the driftwood below. *Held*, that there was sufficient evidence to support the allegation of the city's negligence in the construction and condition of the road. Following White *v.* City of Ballard, 19 Wash. 284, 4 Am. Neg. Rep. 239, 53 Pac. Rep. 159.

PERMANENT INJURIES — EXPERT TESTIMONY. — Where the complaint alleged that plaintiff was permanently injured and would continue to suffer great bodily pain and mental anguish for the remainder of his life, and

that plaintiff would be incapacitated from doing his work for two years, testimony of his attending physician that plaintiff was permanently injured was admissible.

ORDINARY AND REASONABLE CARE — INSTRUCTION. — An objection to an instruction that city was required to exercise "ordinary care" in keeping its streets and sidewalks in safe condition on the ground that the law only requires "reasonable care," cannot be sustained, as the terms "ordinary care" and "reasonable care" are, in substance, convertible terms.

Appeal from Superior Court, King County.

Action by W. G. Taylor against the City of Ballard. From a judgment for the plaintiff, defendant appeals. *Judgment affirmed.*

WILMON TUCKER, IVAN L. HYLAND, and JOHN W. PETER, for appellant.

P. V. DAVIS and WILLIAM A. GILMORE, for respondent.

DUNBAR, J. — This is an action for damages for personal injuries alleged to have been suffered by the plaintiff while driving on an elevated road in the city of Ballard. The verdict was for the plaintiff in the sum of $10,000, which was reduced by the trial court, on motion for a new trial, to $9,750. From that judgment this appeal is taken.

The accident occurred opposite the city waterworks and electric light plant, which were constructed by the city several years before the accident, and ever since have been, and now are, operated by the city of Ballard, at a place where the road was not guarded on either side. At the place where the accident occurred the road was elevated about four feet on the side next the waterworks and light plant, and from three and one-half to six feet on the other side next the bay, — the side where the plaintiff fell off the road. The road is the principal traveled road between Ballard and Fremont. The plaintiff was driving on this road about eight o'clock in the afternoon of April 24, 1899, with a horse hitched to a buggy. The horse is shown to have been a gentle horse, and accustomed to being driven by ladies. It appears that the plaintiff had never been over this part of the road before. The testimony showed that he was a reasonably experienced driver, but the night was dark, and he did not know that the road was elevated or unguarded at that place. There had been, before the accident, a stringer four inches by six inches wide nailed to the planking along the outer edge of the road; but this slight protection had been missing for six months prior to the accident, so that the road was absolutely unprotected for a distance of about thirty-five feet. There were two pipes leading from the pump house under the road, and the officers who were running the

light plant were in the habit of blowing off steam through these pipes from the cylinder cocks of the light plant in the evening about the time the plaintiff was passing. This steam arose from both sides of the road, sometimes blowing across the road, and this was the condition on the evening of the accident. As plaintiff approached the pump house and electric light plant he stopped his horse to permit a lady bicyclist to pass, when he immediately started forward. It does not appear, however, that the horse became frightened at the bicycle. At this time also some small animal ran across the road in front of the horse, and it is contended by the appellant that the testimony does not show whether it was the steam from the pipes or the animal which scared the horse, but the testimony of the plaintiff is to the effect that the animal ran across the road after the horse was frightened by the steam, and, if his testimony is true, the animal had nothing to do with scaring the horse. But the noise at the pump house, and a cloud of vapor which arose from the left side of the road, attracted the attention of the horse, and it refused to go ahead. Just at that time another cloud of vapor arose from the other side, and the horse began to back, and backed the buggy over the side of the road, and into the driftwood below. The respondent testified that when he felt the wheels dropping over the embankment he tried to save himself by attempting to jump from the buggy, but did not succeed in getting out. He was thrown violently among the driftwood, where he was found an hour or so afterwards, lying in an unconscious condition, about three feet from the tide, which was coming in.

Many assignments of error are made, which we will not undertake to follow *seriatim*. It seems to us that the principal question in this case, viz., whether the city was responsible for the condition of the road which was the cause of the injury, was decided by this court against appellant's contention in White *v.* City of Ballard, 19 Wash. 284, 4 Am. Neg. Rep. 239, 53 Pac. Rep. 159, where the plaintiff recovered for an accident which befell her while driving in a buggy when the horse took fright from several bicycles on an eight-foot planking, causing it to back off of the planking to the depression below; there being no guard rail where the accident occurred. This court in that case said: "The question of negligent construction and condition of the street, upon these facts, was certainly one for the jury, and there is substantial evidence to sustain their deduction of such negligence. The bicyclists who occasioned the fright of the horse were not guilty of any negligence or wrong. It was, then, a question for the jury to determine whether the negligent condition of the street was the proximate cause of the injury. We are

satisfied with the instructions of the Superior Court given to the jury upon the question of negligence. It would be of but little value to review the almost infinite number of cases upon this question. Streets must be so constructed that the ordinary horse, with the ordinary disposition, allowing for the ordinary incidents of caprice or fright, can be driven with reasonable safety on them." This language, if applied to the case under discussion, would work an affirmance of the judgment. The street or road in this instance, under the testimony of the plaintiff, at least, was not so constructed that the ordinary horse with the ordinary disposition — and it is shown that the horse which the plaintiff was driving was a gentle horse — could be driven with reasonable safety. The condition of things shown by the testimony in this case would frighten almost any horse. The noise of the power house, conjoined with the sputtering and hissing of the steam as it escaped from the pipes, would have a tendency to excite even a very gentle horse. The appellant relies upon Teater *v.* City of Seattle, 10 Wash. 327, 38 Pac. Rep. 1006, but that case is not controlling under the circumstances of this case. There, it is true, the team was killed and the buggy injured in an attempt to make a turn on a bridge forming part of a public driveway, by running off the edge of the bridge, which was constructed without a railing; but the theory upon which that case was decided was that the team had become unmanageable, and had run a long distance, — a mile or such a matter, — before the accident occurred; and that the fact of the team becoming unmanageable was not attributable in any manner to any defect in the street, but was from an independent cause, viz., the unmanageable disposition of the horses, — an entirely different proposition from the one involved in this case.

It is insisted that the court erred in allowing Dr. Sloan, the attending physician, to testify as to what his opinion was as to the probability of the plaintiff ever recovering his health again, for the reason that under the allegations of the complaint it was irrelevant, immaterial, and incompetent, because the complaint alleged that the plaintiff would be incapacitated from doing his work for the period of two years, and that it was, therefore, improper to allow the witness to testify that he was permanently injured. But, in addition to the allegations quoted by the appellant, the complaint, in paragraph eight, alleges that plaintiff was permanently injured, and that, on account of such injuries, he would continue to suffer for the remainder of his natural life great bodily pain and mental anguish. There seems to us to be nothing inconsistent in these allegations, for the plaintiff might be incapacitated from doing any work for two

years, and yet, by reason of permanent injury, be rendered more or less inefficient for the remainder of his life. But, in any event, the evidence was sufficient to justify a conclusion by the jury that the plaintiff was permanently injured, and under the provisions of Ballinger's Ann. Codes & St., sec. 6535, all amendments will be considered made that ought to have been made, and the pleading will be treated as amended in accordance with the testimony. Allend *v.* Railway Co., 21 Wash. 324, 58 Pac. Rep. 244.

We think there was no error in admitting the testimony of Dr. Adams as to his opinion of the probable recovery of the plaintiff from the accident.

The fourth allegation of error is the refusal of the court to grant defendant's motion for a nonsuit. The motion was properly denied. There was sufficient testimony as to the causes which frightened the horse to go to the jury. It is insisted by the appellant that the fact that the road had been used daily by hundreds of people for a period of three years without any accident was the strongest evidence that could be introduced that the road was in a reasonbly safe condition. In addition to the fact that this was an argument which would have been more properly addressed to the jury, the plaintiff offered to prove that other accidents had occurred at this place, but was not permitted to do so. The allegations as to the proximate cause were sufficient. Allend *v.* Railway Co., *supra.*

Counsel for appellant strenuously insists that the court erred in allowing counsel for the respondent to indulge in improper statements to the jury, which are criticised as inflammatory, intended to arouse the prejudices of the jury by illegitimate considerations. The only statement which was properly objected to is the statement of the counsel which culminated in the following remark: "And Mr. Taylor tells you the truth when he tells you he will not be able to get married, and I submit the proof shows that he is incapacitated from contracting the marriage relation;" and on objection it was stated by the court that it was proper matter for argument to the jury. Many cases are cited by appellant to sustain his contention. In the very nature of things, the remarks passed upon by the appellate courts have all been different, and it is impossible to lay down a rule that will govern particular cases. For this reason large discretionary powers are conceded to trial courts, who are surrounded with the atmosphere of the trial, and are better able than the appellate court to tell what remarks would have prejudicial effects on the minds of the jury. None of the cases cited by the appellant seem to us to control the case at bar. In Ferguson *v.* State, 49 Ind. 33, which was the trial of a man for murder, during

the progress of the argument for the State counsel commented on the frequent occurrence of murder in the community, and the formation of vigilance committees and mobs, and said that the same was caused by the laxity of the administration of the laws, stating to the jury that they should make an example of the defendant. This was held to be reversible error, and, we think, very properly so; for, as was said by the court: "It is tantamount to saying to the jury, 'Murders have been committed, vigilance committees formed, and mobs assembled in this county, and you may take these matters into consideration in making your verdict; and, as you have got a chance now, you may make an example of defendant.'" This was an appeal to popular prejudice, and a direct attempt to degrade the high office of a juror into that of a mob, and to inflame the minds of the jury against one particular individual because crimes with which he had no connection had been frequently perpetrated in the community. But this case was afterwards distinguished by the Supreme Court of Indiana in Combs *v.* State, 75 Ind. 215, which was also a trial on an indictment for murder. In that case the plea of insanity had been interposed, and the attorney stated that three or four men had been recently executed at Indianapolis, most of whom set up the plea of insanity; and it was held that was not of sufficient materiality to warrant a verdict, that the conduct of the argument was a matter largely within the discretion of the trial court, and that it was only where there was an abuse of such discretion that appellate courts would interfere; and it was there said: "Courts ought not to reverse causes because counsel, in the heat of argument, sometimes make extravagant statements, or wander a little way outside of the record. If a matter of great materiality is brought into the record as a matter of extended comment, then there would be reason for setting aside the verdict. If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. Common fairness requires that courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel, during the argument, may have made some general statements not supported by evidence." This court, in Sears *v.* Seattle Consol. St. R'y Co., 6 Wash. 227, 33 Pac Rep. 389, 1081 (1), where the counsel had made a statement which was admittedly in conflict with the facts, or, rather, where there had been no testimony to warrant the statement, although he claimed that the

1. Sears *v.* Seattle Consol. St. R'y Co., 6 Wash. 227, is reported in 7 Am. Neg. Cas. 86.

statement was a logical inference from the facts proven, said: "But counsel must be allowed some latitude in the discussion of their cases before the jury, and, if they are not permitted to draw inferences or conclusions from the particular facts in evidence, it would be impossible for them to make an argument at all. The mere recital of facts already before the jury is not an argument. There must be some reason offered for the purpose of convincing the mind, some inference drawn from facts established or claimed to exist, in order to constitute an argument. But counsel cannot be compelled by the court to reason logically, or to draw correct inferences from given facts; and, if they err in these respects, it is no ground for a new trial," — citing many cases. But, in addition to the authorties, which almost universally hold that misstatements by counsel will not work a reversal of a judgment unless it clearly appears that the statement was prejudicial, we are satisfied from an investigation of the record that the statement of the counsel was warranted by the testimony of the plaintiff.

An objection is made to the first instruction given by the court, and, without setting forth the instruction *in extenso*, the court, after telling the jury that if they found that the plaintiff had acted as a person of ordinary prudence generally would act under the circumstances, and that no act of his contributed to the injury complained of, said: "And if you further believe from a preponderance of the evidence that in making and maintaining this road at the place in question, including the steam pipes thereunder, if such there were, defendant, the city of Ballard, failed to exercise such care to know the condition of this road to make and keep said road at said place reasonably and ordinarily safe for ordinary modes of travel, as cities like Ballard, through officers of ordinary care and prudence, generally exercise under circumstances entirely similar to all those which surrounded the establishment and maintenance of this Fremont-Ballard road at the place in question; and if you further believe from a preponderance of the evidence that such failure on the part of the city of Ballard, if such failure there was, was the proximate cause (that is, the direct and natural cause) of plaintiff's injury, — if plaintiff was injured, — then you will bring in a verdict for plaintiff," etc. The objection to this instruction is that it endeavors to define the degree of care to be exercised by cities like Ballard in effect as being ordinary care, while the law requires municipalities to exercise only reasonable care, and does not impose upon them the duty of ordinary care in maintaining and keeping their streets and sidewalks in safe condition. We are of the opinion that the distinction undertaken to be drawn between ordinary care and reasonable care

is not recognized by the authorities, but that they are, in substance, convertible terms; and the cases cited by appellant upon this proposition do not sustain it, for in the first case cited (City of Boulder *v.* Niles [Cal.] 12 Pac. Rep. 632), while it was held that it must be shown that the city had not used reasonable diligence in removing certain obstructions from the street, it nowhere appears in the opinion of the court that the term "reasonable diligence" is used as contradistinguished from "ordinary care." But, as showing that it was used in the same sense, the court concludes its observation on this proposition: "If, in point of fact, the proper officers of the defendant city did not know of such obstruction, when, by ordinary and due diligence and care, they ought to have known of it, and removed it, the defendant must be held responsible as in case of actual notice." Dill. Mun. Corp. (4th ed.) secs. 1006–1019, is also cited by the appellant on this proposition, but we think this authority also shows, if it shows anything at all, that there is no distinction made between these terms. All the cases, of course, hold that the corporation is not required to so construct streets or walks as to secure absolute immunity from danger to people who travel upon them; and this is the question which is generally discussed in the cases cited. The language used by Mr. Dillon in section 1006, above cited, is as follows: "Its duty, generally stated, is only to use due and proper care to see that its sidewalks are reasonably safe for persons exercising ordinary care and prudence." It is true that in Prindle *v.* Town of Fletcher, 39 Vt. 255, the court said: "We have never understood that under our statute the duty of the town in the matter of keeping its highways in good and sufficient repair, as affecting its liability to pay damages for an injury caused by a defect in such highways, is to be measured by the exercise of ordinary care and diligence," — basing this announcement largely upon the statute; for, continuing, the court said: "We think no such test and measure are warranted by the statute, or countenanced by judicial decision. * * * The requirement is that the town shall keep its highways in good and sufficient repair. This prescribes its duty. If the town is chargeable with any fault in respect to this duty, then the liability attaches." But even under the statute the language was used unadvisedly by the court, for, proceeding, it says: "It was not the design of the statute to require impossibilities of the town, and to make it the absolute insurer against all accidents and injuries caused by defects in highways. But it was designed to hold the town to insure against accidents and injuries caused by defects existing through any fault of the town." It is not difficult to determine that the exercise of

ordinary care on the part of the city would relieve it from the duties of an absolute insurer against all accidents and injuries caused by defects in highways, and that decision is based upon the particular circumstances of that case, viz., that the ground gave way under the horse through some latent defect under the ground, which was not known, and was not discoverable. The court, in its opinion, says that the plaintiff admitted that the authorities of the town could not have learned about it, and that to hold the town liable in such a case would establish a principle that would render the town liable as absolute insurer against the consequences of all defects. So that the case, while using the language we have quoted, is not really an authority for appellant's contention. But in consonance with the view, which we have always entertained, that "reasonable care" and "ordinary care" are synonymous terms, we cite Read *v.* Morse, 34 Wis. 315, where the court, in discussing this proposition, says: "Yet the degree of care required is the same. In either case reasonable care, or, what is the same thing, ordinary care, only, is required. The term 'reasonable care' has no fixed, definite signification, but is a relative term. The caution which persons of ordinary prudence would exercise in any given case is 'reasonable care,' as the term is used in the law." In 18 Am. & Eng. Enc. Law (1st ed.) p. 398, it is said: "It is difficult to define the term 'ordinary care.' It is a relative term, always dependent upon relationship and circumstances." And in a note on the same page it is said: "Ordinary care depends on circumstances, and is such care as a person of ordinary prudence would have exercised;" citing authorities. So that it would be ordinary care if it was the care which was exercised by reasonable people under ordinary circumstances. We think the distinction, if any at all exists, is too vague to warrant a reversal of the cause on that ground.

Other errors are alleged, but they all hinge more or less upon the propositions already discussed. An examination of the testimony in the case and of the instructions given and refused convinces us that no error was committed in the trial of the cause.

The judgment will therefore be affirmed.

REAVIS, Ch. J., and FULLERTON and ANDERS, JJ., concur.

KRAMER v. WILLY ET AL.

Supreme Court, Wisconsin, March, 1901.

EMPLOYEE KILLED BY EXPLOSION OF BOILER — ASSUMPTION OF RISK. — In an action to recover damages for the death of plaintiff's intestate caused by an explosion of a steam boiler while in defendant's employ, it appeared that deceased, who was defendant's chief engineer and had charge of their boilers and steam power, discovered a leak in the particular boiler in question, a few days before the explosion, and notified a repairer to stop the leak. The repairer carefully examined the boiler, discovered the leak and attempted to caulk it, when the leak which had formerly been only some few inches, extended along until the caulking was completed, a distance of several feet, and the leak was stopped. Deceased, in answer to the repairer's inquiry as to testing the boiler, said it was not necessary. The following day the explosion occurred. *Held*, that defendants were not liable, as there was no negligence shown on their part; and also that deceased assumed the risk of employment (1).

1. *Dynamite explosion — Liability of master for injury to servant.* — In GRIMALDI *v.* LANE ET AL. *(Massachusetts, February, 1901)*, 59 N. E. Rep. 451, dynamite explosion, defendant's exceptions to judgment for plaintiff for $3 000 were overruled. "This was a tort for personal injuries to plaintiff, who was injured by an explosion of dynamite while working in defendants' quarry at Westfield. Plaintiff noticed a hole which had been filled with dynamite, but had not exploded. He called attention of defendants' superintendant to it, and the latter sent one Melone to unload the hole. While this was being done the dynamite exploded, and plaintiff was injured." LORING, J., delivered the opinion as follows: "There was evidence in this case on which the jury were warranted in finding that the defendants' superintendent instructed Melone to unload the hole, and that he was present while Melone undertook to remove the dynamite from it with an iron spoon or scraper; that that was a negligent way of dealing with a hole loaded with dynamite, which had failed to explode; and, finally, that the superintendent did not tell the plaintiff to go away while the hole was being unloaded in this manner. If these were found to be the facts, the defendant was negligent, the injury was not due solely to the negligence of Melone, and the first and third instructions were rightly refused.

"There was also evidence that the plaintiff's work in stone quarries had been confined to removing with a bar the broken stone after a blast had been made, breaking it up with a sledge hammer, and loading it onto wheelbarrows to go to the crusher; that he did not know that a blow or a spark would make dynamite go off, though he thought that "if the dynamite was hit real hard it would be liable to go off." Such an employee cannot, as a matter of law, be held to be guilty of contributory negligence in not going to a safe distance while the hole which did not explode was being unloaded with the iron spoon. The risk of an explosion, under those circumstances, cannot be held, as matter of law, to be obvious to a man of ordinary intelligence, or to a man whose experience in dynamite was no more extensive than the jury were warranted in finding the

APPEAL from Circuit Court, Outagamie County.

Action by Caroline Kramer, administratrix, against T. Albert Willy and others. From judgment for defendants, plaintiff appeals. *Judgment affirmed.*

"Suit by plaintiff, who is administratrix and widow of William H. Kramer, deceased, to recover damages for his death, resulting January 17, 1899, on the explosion of a steam boiler, the property plaintiff's to have been. Exceptions overruled."

Explosion of powder blast — Incompetent servant — Specific acts — General reputation — Evidence — Erroneous Admission — In MCCARTHY *v.* RITCH *(New York, Supreme Court, Appellate Division, Second Department, March, 1901)*, 69 N. Y. Supp. 129, explosion of powder blast, judgment for plaintiff was reversed. JENKS, J., said: "The question involved liability for the acts of an alleged fellow-servant, Bradley, a 'powderman,' who, it is contended, was ignorant and incompetent. The plaintiff, a driller and general laborer in the defendants' quarries, was directed to assist Bradley in making a blast. On the day before the accident two holes, about twenty feet deep and ten or twelve feet apart, had been drilled in a shelf of rock. The holes were partly charged with powder, exploding caps were placed upon the powder, more powder was poured in, and then a tamping of sand completed the charge. Each exploder was connected by two wires running to the surface of the rock, and one wire from an exploder was connected by wire to a wire running from the other exploder, and a further and common connection was made with the cables of an electric battery. At Bradley's command, the plaintiff completed the electric circuit, and an explosion followed. Bradley then tested the first hole with a 'needle' (a steel rod about twenty-five feet long), and said that it was 'all right.' He then tested the second hole, and said that the tamp remained, and then directed the plaintiff to drill it out. The details of the drilling were from time to time directed by Bradley, and while the work was progressing there was an explosion, which severely injured the plaintiff.

"The learned counsel for the respondent contends in his brief that the main question was, did the defendants perform their duty in the choice of Bradley? He argues that the first question was whether Bradley was competent to perform the duties of powderman; and that, if he was not, the second question was, did the defendants know of his incompetency, or had they the means of knowledge thereof, or did they ever make any effort to ascertain his qualifications? The plaintiff called Hamilton to the witness stand. He testified that he had worked in a quarry adjacent to that of the defendants, and that he had personal knowledge of certain 'shots' (or blasts) that Bradley had fired which the plaintiff contended showed his unskilfulness. This question was then put to the witness: 'Do you know what the general reputation of Mr. Bradley was among the men in the quarry and in the neighborhood and in the community there? A. Yes, sir. Q. What was it? (Objected to as incompetent, irrelevant, and immaterial, and not warranted by any foundation at present laid in this case. Objection overruled. Exception.) A. Never was a powderman that anybody ever knew of, or never fired any shot. By the Court: Q. The question is, What was his general reputation? What did everybody say about him? A. Said he was no powderman. Q. That he was no powderman? A. Yes,

of, and in the flouring mills of, the defendants. The plaintiff's evidence disclosed that the deceased at the time of his death was thirty-three years of age; that up to about nine years before he had been a farmer. At that time he came to Appleton, and was apprenticed to the tinner's trade, and worked at various occupations until 1895, when he became employed as a fireman for the defendants, and was employed in that capacity, either by them or others, from that

sir. By Mr. Snyder (plaintiff's counsel): Q. These three shots I have asked you about, were they talked about in the quarry? The Court: You have got enough. You have proved his general reputation, that he was no powderman.' I think that the admission of this testimony was error." (Citing several authorities.) Continuing, JENKS, J., said: "My interpretation of those decisions is, not that evidence of specific acts opens the door for the admission of testimony as to mere general reputation, but of testimony that knowledge of such specific acts was general in the community."

As to an instruction that such testimony should only be considered as tending to show master's knowledge of incompetency of servant, JENKS, J., said: "In my opinion this does not cure the error. The rule is as to such proof that the plaintiff must first show specific acts, and then the general knowledge in the community of such specific acts. If mere testimony that everybody said that Bradley was no powderman was admissible as showing constructive notice to these defendants, then evidence of reputation. unconnected with any specific acts, was admissible for that purpose, which I think is counter of the rule. Reputation general in the community for incompetency, based upon acts, or reputed acts, of ignorance or carelessness, is one thing; the mere gossip or speech of people, that may have no foundation upon acts even alleged, is another. The learned counsel for the appellants seems to have recognized the difference when, in the course of the trial, he asked the witness, 'These three shots I have asked you about, were they talked about in the quarry?' but the learned court inadvertently checked further inquiry by saying, 'You have got enough; you have proved his general reputation, that he was no powderman.' This was the sole testimony touching the reputation of Bradley, and, under the ruling and charge of the court, it cannot be said that the jury may not have regarded it as evidence tending to establish liability in the defendants upon the question mainly contended. The reversal is upon the grounds indicated, and no opinion is intended to be expressed either upon the liability or the immunity of the defendants in this action."

Explosion in boiler room — Dangerous place — Assumption of risk. — In ROHAN *v.* METROPOLITAN STREET R'Y CO. *(New York, Supreme Court, Appellate Division, Second Department, March, 1901)*, 69 N. Y. Supp. 570, employee injured in boiler room while trying to reach valve of boiler which had exploded, judgment dismissing complaint was affirmed. JENKS, J., said: "The action is for negligence, and plaintiff would make the defendant liable for negligence in construction and in maintenance of a bridge in its fire room. There were twelve boilers in this room, placed in a row, and numbered from 1 to 12, and connected by valves with the main steam pipe. The bridge, of iron latticework, was suspended from the ceiling, thirty feet above the floor, and ran in front of the boilers. The platform of the bridge ended at some distance beyond boiler No. 4, but the hand

time to some four months before his death. During a considerable part of the time of his employment by the defendants as a fireman he served as engineer, and something like four months before the accident he became their chief engineer, and thence up to the time of his death had charge of their boilers and steam power. The boiler in question had been used about four years, and was manufactured for the defendants by manufacturers having reputation

rail thereof ran beyond that end. Two ladders, placed at boilers 5 and 6 and at boilers 9 and 10, respectively, gave access from the floor to the bridge. The fire room was lighted by windows, and, when necessary, by electricity. The plaintiff had been employed in that room for four years (three as a fireman, and one as a water tender); and it was his duty, as occasion required, to connect or to disconnect, by the valves, the boilers and the main steam pipe. About five o'clock on the afternoon of January 29, 1899, there was an explosion at boiler 9. Plaintiff, then on duty, went up the ladder at boilers 4 and 5 to reach the valve. It worked with difficulty, the plaintiff was scalded, the room became dark from vapor, and the plaintiff then began to make his way along the platform, on his hands and knees, towards the ladder between boilers 4 and 5. He testifies: 'I came along on my hands and knees — crept along — trying to escape, until I came to the end of the bridge, and there was a hole. I felt that I was falling.' No other witness of the accident was called. The part of the platform from which it is alleged the plaintiff fell was never used by the plaintiff or by any of the employees, nor was there occasion to foresee that any one would go there for any purpose. The plaintiff testifies: 'I never went past No. 5 boiler. Never had any cause to. Didn't see any use for it. It was not necessary to go on that platform for cutting off of valves beyond boiler 5.' The construction of boilers 1 to 4, inclusive, was different from that of the others; the valves of the former being reached without going upon the bridge. Plaintiff's witness Roarty testifies that the place where plaintiff fell was where the platform 'was not used at all,' and that the end thereof was about twelve feet distant from the top of the ladder, 'where men would get upon the platform.'

"Even assuming that the entire bridge and its platform were used, or were for use, the defendant had the right to construct and to maintain them in the manner in question, provided any danger to its employee was open, and not due to a latent defect. De Forest *v.* Jewett, 88 N. Y. 264, and cases cited; Robbins *v.* Paper Co., 65 N. Y. Supp. 955, 962. The plaintiff had been employed in that room for four years. He had seen the construction of the boilers and the bridge from the beginning. He testifies that from the floor of the room one could see the entire platform perfectly apparent. He had occasion to use the bridge sometimes once a day, sometimes once a week, and his witness Roarty testifies that when one was on the platform the space was just as apparent to anybody 'as the presence of the stenographer.' I think that the plaintiff must fail, for the reason that he took the risks which were known, or which were obvious to persons of ordinary intelligence. De Forest *v.* Jewett, *supra*; Williams *v.* Railroad Co., 116 N. Y. 628, 22 N. E. Rep. 1117; Crown *v.* Orr, 140 N. Y. 450, 35 N. E. Rep. 648." Judgment affirmed.

For other actions arising out of Explosions, from 1897 to date, see vols. 1–9 AM. NEG. REP., and the current numbers of that series of Reports.

amongst the best boiler makers in the United States, and was of superior materials. It was sixteen feet long by seventy-two inches in diameter, consisting of a steel shell three-eighths of an inch thick, with seams fastened with a double row of rivets two and one-half inches apart, and rested upon a brick foundation. The boiler had been in continuous use and carefully cared for, and needed no repairs until a few days previous to the explosion, when the deceased discovered a slight leak in a horizontal seam. He notified the owners on Sunday, January 15th, who employed one Fairbanks, running the only boiler shop in Appleton, with large experience and good standing and repute as a repairer of boilers. After looking at the boiler, he indicated a portion of the brick wall needing to be removed, and the following day came, and, under the directions of the deceased, proceeded to examine and repair the boiler. He examined it carefully inside and out, discovered no defects after emptying and filling it with water two or three times, except the slight leak referred to, and attempted to caulk it. As he did so, the leak, which had formerly been for only some four inches of the seam, extended along until he had completed his caulking for a distance of several feet and stopped the leak. He then inquired of the deceased, "Shall we test the boiler?" to which deceased replied, "No; it is not necessary." He accordingly went away, the brick foundation was replaced, steam generated the following day, and when it reached somewhere between 90 and 100 pounds pressure the boiler exploded, killing the deceased, who was engaged in his duties about the same. It was then found that in the underlying lap of steel, at about the place where the leak had been, was an old crack extending horizontally a distance of some feet between the two rows of rivets. This crack did not extend through the whole thickness of the metal, but varied in depth from one-sixteenth of an inch to nearly the whole thickness, and is assumed to have been the cause of the explosion. It could not be discovered by either external or internal inspection nor by sound. Plaintiff's witnesses all testified that, if there were any reason to apprehend a defect, the proper precaution was to test the boiler by a cold-water pressure test, and that thereby the defect in question would have been discovered; also that, if caulking was effective to stop leak, one would not apprehend such defect. The defendants had no knowledge of the condition of the boiler save such as they derived from the deceased himself. The leak was such a one as ordinarily an engineer would repair without sending for a boiler maker. At the close of plaintiff's evidence, on motion, judgment of nonsuit was granted, from which the plaintiff appeals."

A. M. SPENCER (JOHN BOTTENSEK, of counsel), for appellant.

LYMAN E. BARNES, for respondents.

DODGE, J. — The case made by plaintiff's evidence, though accorded the most favorable inference, clearly fails to show any negligence by defendants in ascertaining and maintaining the safety of the boiler which the deceased operated. Due care in its original purchase is affirmatively shown. Frequent and careful inspection by the engineer in charge is also proved up to the time when it passed into the care of the deceased. There is no evidence as to such precautions during the four months of his control, but such omission cannot adversely affect defendants, both because negligence must be proved affirmatively, and because, if there was omission of usual precaution in this respect, it would be the negligence primarily of the plaintiff's intestate. But, indeed, there is no claim of any negligence during any period preliminary to the discovery of the leak on the Saturday preceding the Tuesday of the explosion. Of this leak the defendants are not shown to have had any knowledge except such as they derived from the deceased, who was in charge of the apparatus, a man of mature years, who had, to the knowledge of defendants, between four and five years' experience in operation of boilers either as fireman or engineer, and who, by accepting the latter position, had asserted his own qualifications. Upon his notification, the defendants employed a boiler repairer of standing and repute to do what was necessary, under decedent's directions. It is difficult to conceive any greater care which they could have exercised for their employee's safety, except, perhaps, to discharge him from the employment in proximity to a leaking boiler. But plaintiff contends that at this point the boiler repairer became the representative of the employer, and that he was guilty of omission to do all that could have been done to ascertain whether there was other defect in the boiler than mere opening of seams; insists that he might have cut away the bolts, and examined the steel plates where they lapped over each other, and might have applied the water-pressure test, either of which would have disclosed the crack or fissure which existed. Plaintiff's witnesses testify that customarily nothing of the sort would be done if caulking proved effective to stop the leak, and that, if any suspicion of weakness were justified, the usual precaution would be to test the boiler. The repairer, Fairbanks, excluded responsibility for the leak of any break in the iron by careful visual examination and by the hammer test, and he effectually stopped the leak by caulking. Under the evidence, he might consistently, with due care, have stopped there, but he did not. He submitted to the plaintiff's

intestate the question whether he should make a test of the boiler, and was by him directed not to do so. It appears conclusively by plaintiff's testimony that this conduct was not negligent; that it was the usual and customary caution, under the circumstances. Counsel, however, urges that we must hold as matter of common knowledge that the omission of the pressure test is negligence, since it might have disclosed the weakness. This contention, if sustained, must equally defeat plaintiff's recovery; for her intestate voluntarily accepted the risk of such omission with full knowledge of its occurrence. To him, a trained engineer, is certainly to be imputed as much knowledge of the necessity or propriety of such test as can be assumed by a court by virtue of its imputed acquaintance with merely the common knowledge on the same subject. If we can know that such omission was negligence, certainly he must have known it, and must be chargeable with assumption of any risk so occasioned. To summarize the situation: The evidence fails to disclose any omission by the defendants of the precautions usual and customary, and, as to the only omission of any precautions shows affirmatively that it occurred with the knowledge and assent of the plaintiff's intestate. Under rules of law, now so trite as to call for neither reiteration nor citation of authority, the defendant cannot be held liable, and judgment of nonsuit was proper.

Judgment affirmed.

CLARK ET AL. V. ZARNIKO.

United States Circuit Court of Appeals, Eighth Circuit, February, 1901.

PASSENGER INJURED WHILE ALIGHTING FROM TRAIN — SUDDEN JERK — CONTRIBUTORY NEGLIGENCE — INSTRUCTION — STATUTE — CONSOL. ST. NEB. 1891. SEC. 572. C. 9. — 1. If, at the close of the trial of an action for damages for negligence, the evidence conclusively discloses the fact that the plaintiff was guilty of negligence which contributed to his injury, it is the duty of the trial court to instruct the jury to return a verdict for the defendant.

2. Section 572, c. 9, Consol. St. Neb. 1891, which provides that every railroad company shall be liable for all damages inflicted upon the persons of passengers while being transported over its road, except in cases where the injuries arise from the criminal negligence of the persons injured, does not make a common carrier an insurer of the safety of passengers, but merely establishes a presumption that damages inflicted upon a passenger are entirely attributable to the negligence of the railroad company.

3. If, at the close of the trial of an action by a passenger for negligence, under this statute, the evidence discloses the fact that the plaintiff was guilty of

gross negligence, — that is, of a flagrant and reckless disregard of his safety, — which contributed to his injury, such negligence is fatal to his recovery, and it is the duty of the court to instruct the jury to return a verdict for the defendant.

CALDWELL, Circuit Judge, dissenting.

(Syllabus by the Court.)

IN ERROR to the Circuit Court of the United States for the District of Nebraska. *Judgment for plaintiff reversed.*

JOHN N. BALDWIN (W. R. KELLY, on the brief), for plaintiffs in error.

A. S. CHURCHILL (GEORGE W. COVELL and PHIL. E. WINTER, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. — On the morning of July 10, 1896, Herman Zarniko, the plaintiff below and the defendant in error in this court, boarded a passenger train of the defendants below, the receivers of the Union Pacific Railway Company, at Omaha, in the State of Nebraska, to ride to the packing house of Swift & Co., at South Omaha, where he was employed. He seated himself in one of the passenger cars, but before he arrived at his destination he arose, left the car, and crawled down upon a footboard fourteen inches wide, which extended around the tender of the engine, and rode there until he arrived in South Omaha. At a convenient height above this footboard was a handrail securely fastened to the tender for the purpose of enabling those using the footboard to grasp it, and ride securely. This footboard and handrail had been placed upon the tender of the engine for the convenience of the employees of the railway company, and not for its passengers; but it was the custom of the employees of the packing houses to ride between Omaha and South Omaha upon this footboard, and the conductor and engineer were familiar with this custom, and knew that there were passengers riding upon this board at the time of the accident. When the train had arrived near its destination at the packing house of Swift & Co., and when the plaintiff was about to alight, he was standing on the footboard at one of the rear corners of the tender, leaning against the handrail, without in any way grasping or holding it. Thereupon the engineer, having stopped his engine, found it necessary to move it forward, and in doing so gave it a sudden jerk, and the plaintiff fell off between the tender and the forward passenger car, which passed over his leg, and necessitated its amputation. He sued the defendants for negligence in the operation of this train. They denied negligence, and alleged that the

plaintiff was guilty of negligence which contributed to his injury. There was at trial, and a verdict and judgment for the plaintiff, which are challenged by this writ of error.

The first error assigned is that the court below should have instructed the jury to return a verdict for the defendants. There is a statute in the State of Nebraska which reads: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Consol. St. Neb. 1891, c. 9, sec. 572.

The Supreme Court of Nebraska has defined the term "criminal negligence" in this statute to be gross negligence; such negligence as would amount to a flagrant and reckless disregard of one's safety, or to a wilful indifference to the injury liable to follow. It has also declared that the purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurer, but that it was rather intended to establish a presumption from an injury to a passenger that the damages inflicted by such injury were entirely attributable to the negligence of the railroad company, and that to avoid liability it devolves upon the company to show that the injury was imputable to the criminal negligence of the party injured, or to his violation of some express rule or regulation of the road actually brought to his notice. Omaha & Rep. V. R. R. Co. *v.* Chollette, 33 Neb. 143, 146 (1); Mo. Pac. R'y Co. *v.* Baier, 37 Neb. 235, 255 (2). Accepting these declarations of the Supreme Court of Nebraska as to the meaning and purpose of this statute, the question presented by the first specification of error is whether or not the evidence at the close of the trial of this case conclusively disclosed the fact that the plaintiff was guilty of gross or criminal negligence which contributed to the injury which he suffered. If so, it was the duty of the court below to grant the request of the defendants. If, at the close of the trial of an action for damages for negligence, the evidence conclusively discloses the fact that the plaintiff was guilty of negligence which contributed to his injury, it is the duty of the trial court to instruct the jury to return a verdict for the defendant.

1. Omaha & Republican Valley R. R. Co. *v.* Chollette, 33 Neb. 143, is reported in 4 Am. Neg. Cas. 846. See also other decisions in same case, 26 Neb. 159, 4 Am. Neg. Cas. 835, and 41 Neb. 578, 4 Am. Neg. Cas. 885.

2. Mo. Pac. R'y Co. *v.* Baier, 37 Neb. 235, is reported in 4 Am. Neg. Cas. 874.

Railway Co. *v.* Davis, 53 Fed. Rep. 61, 3 C. C. A. 429, 10 U. S. App. 422; Gowen *v.* Harley, 56 Fed. Rep. 973, 980, 6 C. C. A. 190, 197, 12 U. S. App. 574, 585; Railway Co. *v.* Moseley, 57 Fed. Rep. 921, 922, 923, 6 C. C. A. 641, 643, 12 U. S. App. 601, 604; Reynolds *v.* Railroad Co., 69 Fed. Rep. 808, 810, 16 C. C. A. 435, 437, 438, 32 U. S. App. 577, 582; Laclede Fire-Brick Mfg. Co. *v.* Hartford Steam-Boiler Inspection & Insurance Co., 60 Fed. Rep. 351, 354, 9 C. C. A. 1, 4, 19 U. S. App. 510, 515; Motey *v.* Granite Co., 74 Fed. Rep. 155, 157, 20 C. C. A. 366, 368, 36 U. S. App. 682, 686; Commissioners *v.* Clark, 94 U. S. 278, 284; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266; Railroad Co. *v.* Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569. It is difficult to conceive of any acts which could amount to gross negligence, to a flagrant and reckless disregard of one's own safety, or to a wilful indifference to the injury liable to follow if those of the plaintiff in this case do not constitute such negligence, recklessness, and indifference. Here was a passenger train running at rapid speed from city to city, making stops on the way to its destination, provided with passenger cars, in one of which the plaintiff secured a seat, and with a tender to its engine around which there ran a footboard fourteen inches wide and a handrail to enable the employees who necessarily rode upon the engine to secure themselves from accident by grasping the rail. The plaintiff left his seat in the car, passed out upon its platform, crawled down from the platform to the footboard of the tender, passed around to the corner of the footboard; and while the engine was nearing its destination, slowing up and starting on to make its proper stops, he stood upon the corner of this footboard, leaning carelessly against the rail, without grasping it with his hands, or holding to it in any way, to secure himself against falling. The danger of such a position was open, plain, patent. The place of safety was in his seat in the car. No one who remained in or on the passenger cars was injured by the motion of the engine. To leave this place of safety, to crawl down upon this footboard, and station one's self upon its corner, without grasping the rail provided for the safety of the employees who necessarily rode upon this tender, and to stand there listlessly leaning against the tender while the engine was necessarily making its stops and starts, constituted a plain and flagrant disregard of his own safety, a wilful indifference to the injury that was plainly liable to follow, which contributed to the injury of the plaintiff, and is fatal to his recovery. The court below should have instructed the jury to return a verdict for the defendants.

There is another specification of error which is fatal to the verdict and judgment in this case. It is that the court delivered to the jury the following portion of its charge: "Now, if you find that such was the case — that in leaving the seat in the car, and going out upon the footboard of the tender of the engine, and standing there in the manner in which you find the evidence shows he did stand, that that amounted to a flagrant and reckless disregard of his own safety, to a wilful indifference upon his part to the injury liable to follow — I say, if you find that to be true, and find further that the injury would not have happened to him but for his being out there in that place, would not have happened had he remained in the car, then the plaintiff would not be entitled to recover in this action, unless you should find further upon this proposition. Now, a person might, by his own recklessness and carelessness, place himself in a position of danger, and be entitled to recover, where the other party, with full knowledge of his dangerous position, commits some act of negligence without which he would not have been injured except for that negligent act. To illustrate what I mean by that: Supposing I go out and lie down with my limb across the railroad track, and go to sleep. Now, everybody would say that that was the grossest kind of carelessness; negligence that amounted to a wilful disregard of my safety. And if, while I am lying there asleep, a train is approaching, it is the duty of the engineer in the engine to look ahead — his place is to look ahead — to see what is on the track, and to avoid danger. Now, if the engineer, in coming, sees me lying there on the track, across the rail, and has ample time and can stop his engine, thereby preventing any injury, and yet he does not do that, but just simply says I have no business there, and will go on and run over me, why, then the company would be liable, notwithstanding my negligence in going there and lying across the track in that position and in that condition, because there you can see was a duty incumbent upon the engineer, knowing that I was lying there in that position, to avoid running over me if he could; and if he showed the reckless disregard of human safety, and never attempted to stop his train, but ran right along, and ran over my limb, I would be entitled to maintain an action, notwithstanding my own negligence in going there and lying upon the track. So, then, in this case, if you find that this plaintiff was negligent in going upon this running-board, that his negligence was of that character which I have defined as amounting to criminal negligence, then your inquiry should be, did the engineer who operated this engine, knowing he was there in that place of danger, and knowing the dangerous condition — did the engineer carelessly

and negligently cause the engine to make a sudden jerk, which precipitated him off from the engine, and caused the injury? Now, if, as I say, the engineer, knowing that he was there, in that dangerous position upon the footboard, managed the engine in a negligent and careless manner, if he negligently and carelessly caused it to make a sudden jerk, which caused the injury to the plaintiff, then the plaintiff would be entitled to recover, notwithstanding his negligence in going there, upon the principle which I have illustrated by the circumstance of my lying on the track. In determining that question as to whether or not the engineer managed his train in a negligent manner in that respect you must take into consideration what knowledge, if any, the engineer had as to his being upon the footboard, and that the engineer would have a right naturally to assume that a person in that dangerous place would exercise all of the care which an ordinarily reasonable and prudent person under like circumstances would do to secure his safety. Now, if, as I say, there was a handrail along the engine there, ask yourselves what would an ordinarily careful and prudent person riding upon that footboard there naturally do in regard to taking hold of that rail. Would an ordinarily careful and prudent person riding there, with the train in motion, place his hand upon the rail, so as to secure himself from being thrown off by a little sudden jerk, or something of that kind? And, if so, then the engineer would have a right to assume that a person standing upon a footboard was exercising ordinary care and prudence, such as an ordinarily careful and prudent person would do under like circumstances. Taking that into consideration, then, was the action of the engineer in starting the train up with a sudden jerk, if you find that such was the case, that the train was so started — after having nearly stopped, started up with a sudden jerk — was that an act of carelessness or negligence upon the part of the engineer, having knowledge that the party was there upon this footboard, and having a right to rely upon the fact that a party there in that dangerous condition was exercising ordinary care and prudence, such as an ordinarily careful and prudent person in the same situation would do to secure himself? And that is to be determined on the basis as to whether or not an ordinarily careful and prudent person in that place would have kept his hold of the rail there to secure himself under those circumstances. Then, if you find that notwithstanding the fact that the plaintiff in going out upon this running-board, and standing there in the condition in which he was at that time; notwithstanding, I say, that you may find that that amounted to criminal negligence within the definition as I have given you of criminal negligence, yet that injury

would not have occurred to him but for what amounted to a negligent management of the train by the engineer under the circumstances in which it was managed, that the plaintiff was injured by reason of that negligence of the engineer in the manner in which I have defined what would be negligence upon his part, he presuming that the party upon the footboard was exercising that reasonable care and prudence which an ordinarily careful and prudent person would do under like circumstances; if you find, I say, that, notwithstanding the plaintiff was criminally negligent in going out upon that footboard, the injury would not have occurred except for the negligence of the defendant, with that knowledge, in starting and managing his train — then the plaintiff would be entitled to recover notwithstanding his negligence. If, on the other hand, you find that the plaintiff was criminally negligent within the definition as I have given it to you of criminal negligence, and that the engineer, in managing the train, with the knowledge which he had, and with the right to presume that the persons there would exercise the ordinary care and prudence of an ordinarily careful and prudent person, that the engineer was not guilty of negligence under those circumstances in the management of the train, then the plaintiff would not be entitled to recover."

Perhaps the views of the court may be deduced from a careful perusal and analysis of this charge, but it was delivered to the jury orally. They heard it but once. It contained the unfortunate illustration of an engineer running his engine knowingly and wilfully over the limb of a sleeping man upon the railroad track, when there was no charge or proof of wilful or intentional injury inflicted upon the plaintiff by the engineer of the defendant; and we are not satisfied that the principles applicable to this case were so clearly and tersely presented to the jury by this instruction that the defendant was not deprived of a fair trial of its case. For these reasons the judgment below is reversed, and the case is remanded to the Circuit Court, with instructions to grant a new trial.

CALDWELL, Circuit Judge. — I dissent from the first ground assigned for the reversal of this case and concur in the second.

CUDAHY PACKING COMPANY v. MARCAN.

United States Circuit Court of Appeals, Eighth Circuit, March, 1901.

MINOR EMPLOYEE SLIPPING ON GREASY FLOOR AND INJURED BY MACHINERY — ASSUMPTION OF RISK — INSTRUCTION. — 1. A minor employed as a servant assumes, to the same extent as an adult, the ordinary dangers and risks of his employment which he actually knows and appreciates, and those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them.

2. At the close of the evidence there is always a preliminary question for the judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly return a verdict in favor of the party who produces it, and, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him.

3. A minor who for four weeks had been working upon a block fourteen inches square and five inches in thickness, placed upon a wet, greasy, and slippery floor by himself, assumes the risk and danger of the slipping of the block upon the greasy floor, by means of which his hand is involuntarily thrown into the cylinders of a chopping machine.

(Syllabus by the Court.)

IN ERROR to the Circuit Court of the United States for the District of Nebraska. *Judgment for plaintiff reversed.*

JOHN C. COWIN (LYSLE I. ABBOTT and M. L. SEARS, on the brief), for plaintiff in error.

W. J. CONNELL (MR. IVES, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. — This was an action by an employee against his employer for a failure to discharge its duty to use reasonable diligence to furnish its servant with a reasonably safe place in which to perform his work, and the answer was that the risk and danger from which the servant suffered was one of the ordinary and patent risks of the employment which he had assumed. At the close of the trial the defendant below requested the court to instruct the jury to return a verdict in its favor, and the refusal to grant this request is the chief error of which complaint is made. The Cudahy Packing Company, the plaintiff in error, was a corporation engaged in the business of packing meat, as its name implies, and Frank Marcan was one of its employees, who was engaged in operating a machine for chopping meat, called a "hasher." On April 30, 1898, Marcan accidentally put the fingers of his left hand into the hasher

and lost them. He sued the corporation for negligence, in that it permitted the floor on which he was working to become so slippery that a block on which he was standing slipped, and caused him to throw his hand into the hasher, and in that it used a box or hopper upon the chopping machine to enable the operative to feed the meat into the hasher, which he alleged also contributed to his accident. The great weight of the testimony was that the block did not slip, and that the accident was the result of the carelessness of the defendant in error in feeding the meat into the hasher. Upon the question under consideration, however, this evidence will not be considered, and it is accordingly laid aside. The testimony of the defendant in error and of his witnesses, which alone will be considered in this opinion, was that these were the facts which conditioned his case: He was a minor of ordinary intelligence, more than seventeen years of age. He had been at work for the plaintiff in error for some weeks, when about March 20, 1898, he was assigned to operate the hasher. This hasher consisted of rapidly revolving cylinders, driven by machinery which chopped or hashed the meat which was fed into it through a hole above the cylinders. Over this hole a removable feeding box or hopper was fastened when the machine was in operation. The sides of this feeding box were five or six inches high, and it was the duty of the defendant in error to feed the meat which was placed in this box into the hasher. When he first took charge of the chopping machine he was taught to draw the meat in the box forward, and to feed it into the hasher through the hole over the cylinders with his hands. But he was afterwards furnished with a wooden tool called a "stuffer," and was instructed by his employer to use this instrument when the machine became clogged for the purpose of stuffing the meat down into and through it. This stuffer was a wooden block three and one-half inches in diameter and four inches long, provided with a handle. The hasher stood within a few inches of the south wall of the building, on a floor which sloped gently to the north, and when the feeding box was in place it stood so high that it was necessary for the operator to raise himself four or five inches above the floor in order to do his work conveniently. When the defendant in error commenced to operate this machine he was furnished with a box upon which he stood in front of the hasher to feed the meat into it. But four or five days later this box was broken, and then, by direction of his employer, he took a chopping block, placed it in front of the hasher, and thereafter stood upon this block when he was feeding the machine. This block was made of hard wood, was about fourteen inches square, five inches thick, and had an iron band around it

two and one-half inches wide, and one-half an inch thick. He placed this block in a position the first time he used it, and from time to time thereafter, as it was misplaced during the washing of the floor, he replaced it. Neither the foreman nor any of the other employees of the plaintiff in error handled or placed the block. It was the custom in some packing houses to use salt upon the floor to prevent it from becoming slippery, but no salt was used upon the floor of this building. Marcan testified that the floor upon which this block lay was wet and greasy most of the time, that it was slippery when he first placed the block there, and that he knew it was slippery. He further testified that on April 30, 1898, while he was standing upon the block holding the stuffer in his right hand, and feeding the meat into the hasher with his left hand, the block slipped sideways to his right; that he tried to catch himself, and his hand went down into the machine; and that the block was caused to slip by "the greasy floor not being nailed." This is the case which the defendant in error made when it is conceded that all the testimony which contradicts his story is unfounded in fact.

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care and prudence. A minor assumes the ordinary dangers and risks of his employment that he actually knows and appreciates, and those which are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care and prudence, know and appreciate them to the same extent as an adult. By entering upon and continuing in the employment he assumes these risks and dangers, and no negligence can be charged to the master, and no liability can be fastened upon him, because he fails to give notices or warnings of or to remove these common risks of the employment. Manufacturing Co. *v.* Erickson, 55 Fed. Rep. 943, 946, 5 C. C. A. 341, 344, 12 U. S. App. 260, 265; Pressed-Brick Co. *v.* Reinneiger (Ill. Sup.) 29 N. E. Rep. 1106, 1107; Dowling *v.* Allen, 74 Mo. 13, 16; Railway Co. *v.* Valirius, 56 Ind. 511, 518; Buckley *v.* Manufacturing Co. 113 N. Y. 540, 21 N. E. Rep. 717; Railway Co. *v.* Frawley (Ind. Sup.) 9 N. E. Rep. 595, 598; Engine Works *v.* Randall, 100 Ind. 293, 298, 300; Berger *v.* Railway Co., 39 Minn. 78, 38 N. W. Rep. 814; Sullivan *v.* Manufacturing Co., 113 Mass. 396; Fones *v.* Phillips, 39 Ark. 17, 38. Under this well-settled rule and the testimony of the defendant in error, it is impossible to sustain his recovery in this case. He testified that his accident was caused by the slipping of the block which he himself placed before the hasher on the wet and

greasy floor. He knew that the floor was wet, greasy, and slippery. He had walked and worked upon the floor, placed and replaced the block upon it, for four weeks. If it was wet, greasy, and slippery, he knew the fact; knew his liability to slip and fall as he walked across it; knew the danger that the block itself might slip. If, as he walked along the floor, he had slipped and fallen, could he have recovered of the plaintiff in error? The question is susceptible of but one true answer. But he was as familiar with the danger that the block would slip as he was with the risk of the slipping of his feet. He, and he alone, had handled, placed, and replaced the block during the four weeks that he had occupied it as his standing ground. He knew that, if his fingers fell into the hasher, they would be injured, perhaps destroyed. All these risks and dangers were so simple, open, obvious, that the conclusion is inevitable that he impliedly contracted not only to work in this place, but also to assume the danger of accidents arising from the wet, greasy, and slippery floor, and the revolving cylinders of the chopping machine. Kleinest *v.* Kunhardt, 160 Mass. 230, 35 N. E. Rep. 458; O'Maley *v.* Light Co., 158 Mass. 135, 32 N. E. Rep. 1119; Fisk *v.* Railroad Co., 158 Mass. 238, 33 N. E. Rep. 510; Glover *v.* Bolt Co. (Mo.Sup.) 55 S. W. Rep. 88; Buckley *v.* Manufacturing Co., 113 N. Y. 540, 21 N. E. Rep. 717.

There was therefore no substantial evidence in this case upon which the jury could properly render a verdict in favor of the defendant in error, and it was the duty of the court below to direct them to return a verdict against him. Railway Co. *v.* Price, 97 Fed. Rep. 423, 427, 38 C. C. A. 239, 243; Commissioners *v.* Clark, 94 U. S. 278, 284; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266; Railroad Co. *v.* Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569; Laclede Fire-Brick Mfg. Co. *v.* Hartford Steam-Boiler Inspection & Ins. Co., 60 Fed. Rep. 351, 354, 9 C C. A. 1, 4, 19 U. S. App. 510, 515; Gowen *v.* Harley, 56 Fed. Rep. 973, 6 C. C. A. 190, 12 U. S. App. 574; Motey *v.* Granite Co , 74 Fed. Rep. 155, 157, 20 C. C. A. 366, 368, 36 U. S. App. 682, 686; Railway Co. *v.* Belliwith, 83 Fed. Rep. 437, 441, 28 C. C. A. 358, 362, 55 U. S. App. 113, 121.

There are other specifications of error in this case, but it is unnecessary to consider them. The judgment is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

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